

THE
PROBATE & ADMINISTRATION
ACT, 1881

(ACT V OF 1881).

(WITH THE CASE-LAW THEREON)

BY

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THE PROBATE AND ADMINISTRATION ACT, 1881.

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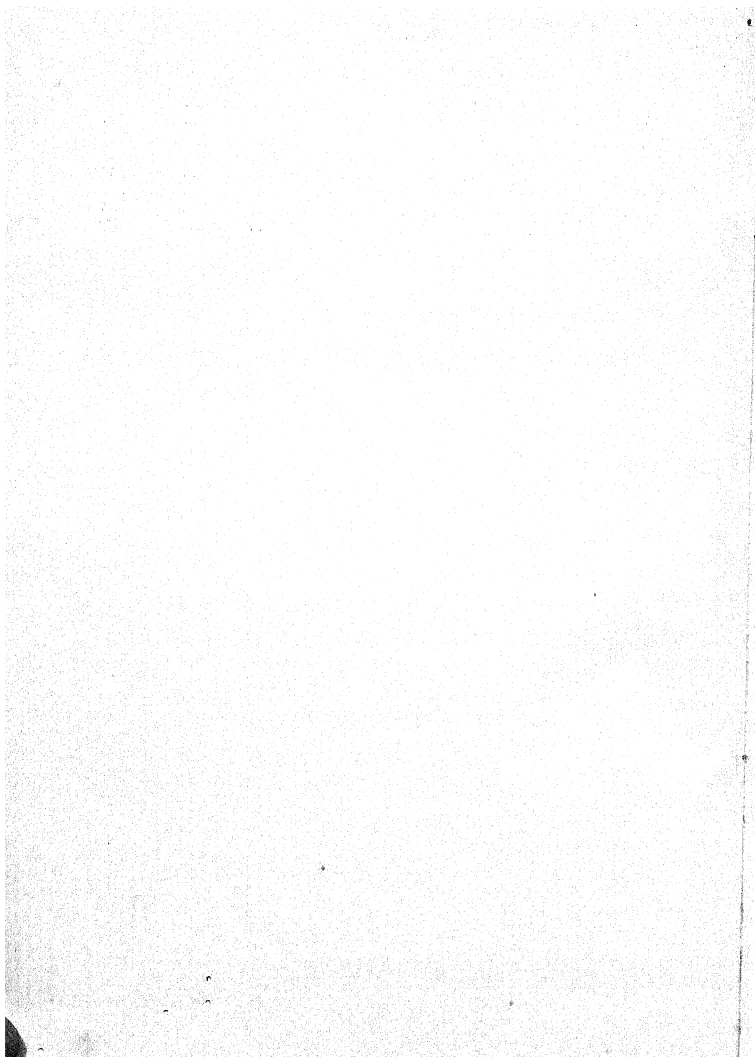
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THE
PROBATE & ADMINISTRATION ACT, 1881.
 (ACT V OF 1881).

TABLE I.
**TABULAR STATEMENT OF REPEALS AND AMENDMENTS OF SECTIONS
 OF THE PROBATE AND ADMINISTRATION ACT, V OF 1881.**

Serial No.	Year.	No. of Act.	Name of Act.	Probate and Administration Act how affected.
1	1889	VI	Probate and Administration Act ...	(1) Cl. 5 of Explanation to S. 50 added. (2) Ss. 76, 77, 90, 98 and 99 amended. (3) S. 157 added.
2	"	VII	Succession Certificate Act ...	Ss. 151 and 153 repealed.
3	1890	II	Probate and Administration Act ...	S. 145 A. added.
4	1891	XII	Repealing and Amending Act ...	Ss. 59, 83 and 152 amended.
5	1900	VI	Lower Burma Courts Act. ...	S. 59, amended.
6	1903	VIII	Probate and Administration Act ...	(1) Ss. 59 and 60 amended. (2) Last para to Ss. 62, 64 and 69 added.
7	1908	IX	Indian Limitation Act.	S. 156 repealed.

TABLE II.

HISTORICAL MEMOIR OF THE INDIAN LAW OF SUCCESSION
AND ADMINISTRATION.

I. REGULATIONS.

A.—BENGAL.

- i. **Regulation II of 1793** (Bengal Inheritance Regulation) :—
regulated succession to land not liable to division by custom :
Repealed in part by Act XVI of 1874.
Amended by Act XII of 1891.
- ii. **Regulation V of 1799** (Bengal Wills and Intestacy Regulation) :—
provided for administration by heirs and executors :
Repealed in part by Act XXV of 1838, Act XXI of 1870, Act XVI of 1874 and
Act XII of 1900.
Amended by Beng. Reg. V of 1827.
- iii. **Regulation X of 1800** (Bengal Inheritance Regulation) :—
saved any established custom of succession to a single heir.
- iv. **Regulation V of 1827** (Bengal Attached Estates Management Regulation) :—
provided for attachment and management of estates under administration by the
Court :
Amended by Act I of 1903.

B.—MADRAS.

- i. **Regulation III of 1802** (Madras Administration of Estates Regulation) :—
provided for administration by heirs and executors in the case of Hindus and
Mahomedans :
Repealed in part by Reg. V of 1829, Act X of 1861, Act XVII of 1862, Act III of
1874, Act XII of 1876, Madras Act V of 1867 and Madras Act II of 1869.
Referred in Abraham's case, 9 M.I.A. 199.
- ii. **Regulation V of 1829** (Madras Hindu Wills Regulation) :—
regulated testamentary succession among Hindus and provided that Hindu Wills
should be in conformity with Hindu Law :
Repealed in part by Act XII of 1876 and Madras Act II of 1869.

C.—Bombay.

- Regulation VIII of 1827** (Bombay Administration of Estates Regulation) :—
provided for administration of estates by heirs and executors and for the grant of
certificates by the Court :
Repealed in part by Act XII of 1873.
See also Act V of 1881, S. 152.

D.—Central Provinces.

- Act XX of 1875** (Central Provinces Laws Act) :—
applied to Central Provinces, Bengal Reg. V of 1799 as modified by Reg. V of 1827.

E.—United Provinces.

- Regulation of 1795** (Benares Inheritance Regulation) :—
applied to Benares, Law similar to Bengal Reg. XI of 1793 :
Amended by Reg. V of 1827.

II.—ACTS.

- (1) **Act IX of 1837** (Succession to Parsis' Immoveable Property) :—
gave to immoveable property of Parsis the nature of chattels real for purpose of succession :
Repealed by Act VIII of 1868.
- (2) **Act XXV of 1838** (Wills Act) :—
based on the Wills Act, 1837, St. 7 Will. IV & I Vic. c. 26;
regulated the law of Wills till 1866 :
Repealed as to Wills made after 1866 by Act VIII of 1868.
Amended by Act XII of 1891.
By S. 3—the Act extended only to Wills of persons whose personal property could not by the laws of England pass to their representatives without Probate or Letters of Administration obtained in one of the Supreme Courts.
- (3) **Act XXIX, 1839** (Dower Act) :—
based on the Dower Act, St. 3 & 4 Wills IV, c. 105 ;
regulated the law of Dower till 1866.
Repealed as to marriages contracted after 1866 by Act VIII of 1868.
By S. 15, the English Act was applied only to cases governed by the English Law of Dower.
- (4) **Act XXX of 1839** (Inheritance Act) :—
based upon St. 3 & 4 Will IV, c. 6 ;
regulated the law of descent till 1866.
Repealed as to intestacies occurring after 1866 by Act VIII of 1868.
By S. 13, the English Act, was applied only to inheritances of land previously subject to the English Law of Inheritance.
- (5) **Act XIX of 1841** (Succession [Property Protection] Act) :—
provided a summary remedy to recover possession of property claimed by right of succession.
Amended by Act XVI of 1874.
- (6) **Act XX of 1841** (Succession of Debts Act) :—
provided for the collection of debts and for the security of parties paying debts to the representatives of deceased person.
Repealed by Act XXVII of 1860.
- (7) **Act XVIII of 1843** (Official Trustees' Act) :—
provided for the appointment of the Official Trustee.
Repealed by Act XVIII of 1864.
- (8) **Act X of 1851** (Administration of Estates Act) :—
extended the power to grant certificate of administration under Act XX of 1841.
Amended by Act VIII of 1854.
Repealed by Act XXVII of 1860.
- (9) **Act XII of 1855** (Legal Representative Suits Act) :—
provided for legal representatives suing and being sued for certain wrongs.
- (10) **Act XIII of 1855** (Compensation for destruction of life) :—
provided for recovery of damages for loss of life occasioned by actionable wrongs.

II.—ACTS—(Continued).

- (11) **Act XXVII of 1860** (Collection of Debts on Succession):—
 Repealed the Acts of 1841 and provided for recovery of debts on succession after production certificate.
 Repealed in part by Act XXIV of 1867, and wholly by Act VII of 1889.
- (12) **Act XVII of 1864** (Official Trustees' Act):—
 provided for vesting of private Trusts in the Official Trustee.
- (13) **Act X of 1865** (Indian Succession Act):—
 regulated intestate and testamentary succession.
 For amendments, see *infra*.
- (14) **Act XXI of 1865** (Parsee Succession Act):—
 regulated intestate succession among Parsis and exempted them from certain sections of the Indian Succession Act.
- (15) **Act XXI of 1870** (Hindu Wills Act).
 regulated wills of Hindus, Jainas, Sikhs, etc., in certain cases and applied to them certain sections of the Indian Succession Act.
 Amended by Act X of 1881 and Act XII of 1891.
- (16) **Act II of 1874** (Administrator-General's Act):
 constituted an Administrator-General for each of the three Presidencies and defined his powers and duties.
 Amended by a series of Acts.
- (17) **Act XIII of 1875** (Probate and Administration Act):—
 Amended certain sections of the Indian Succession Act.
- (18) **Act II of 1877** (Probate and Administration Act):—
 defined the term " High Court " in Act XIII of 1875.
- (19) **Act V of 1881** (Probate and Administration Act):—
 regulated the grant of Probate and Letters of Administration in cases not governed by the Indian Succession Act.
- (20) **Act VI of 1881** (District Delegates Act).
 provided for the grant of Probate and Letters of Administration in non-contentious cases by District Judges.
- (21) **Act IX of 1881** (Administrator-General's Act):—
 exempted Parsis from certain sections of Act II of 1874.
- (22) **Act VI of 1889** (Probate and Administration Act):—
 Amended Act V of 1881.
- (23) **Act VII of 1889** (Succession Certificate Act):—
 consolidated the law as to the collection of debts on succession and the protection of parties paying debts to the representatives of deceased persons.
- (24) **Act II of 1890** (Probate and Administration Act):—
 amended Act V of 1881.
- (25) **Act VII of 1901** (Native Christian Administration of Estates Act):—
 placed Native Christians on the same footing as Hindus for obtaining Letters of Administration, succession certificate, etc.
- (26) **Act V of 1902** (Administrator-General and Official Trustee Act):—
 amended the law relating to Administrator-General and Official Trustee.
- (27) **Act VIII of 1903** (Probate and Administration Act):—
 made further amendments in Act V of 1881.

TABLE III.

COMPARATIVE TABLE OF THE SECTIONS OF THE PROBATE AND ADMINISTRATION ACT, V OF 1881 AND THE CORRESPONDING SECTIONS OF THE INDIAN SUCCESSION ACT X OF 1865.

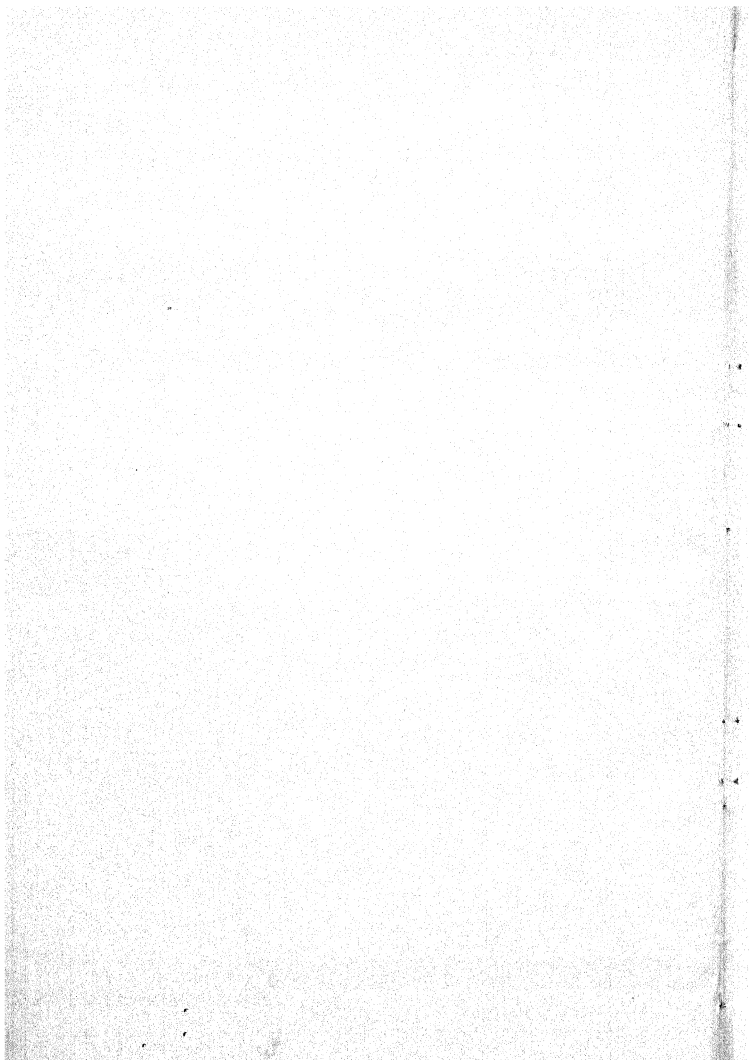
Probate and Administration Act.			Indian Succession Act.		
Section	4 first para	...	Section	179	
"	5	...	"	180	
"	6	...	"	181	
"	7	...	"	182	
"	8	...	"	183, which adds "nor to a married woman without the previous consent of her husband."	
"	9	...	"	184	
"	10	...	"	185	
"	11	...	"	186	
"	12	...	"	188	
"	13	...	"	189, which adds "nor to a married woman without the previous consent of her husband."	
"	14	...	"	191	
"	15	...	"	192	
"	16	...	"	193	
"	17	...	"	194	
"	18	...	"	195	
"	19	...	"	196	
"	20	...	"	197	
"	21	...	"	198	
"	22	...	"	199	
"	23—General rule that grant shall follow the interest ...		"	200 to 207 give the order of persons to whom administration may be granted.	
"	24	...	"	208	
"	25	...	"	209	
"	26	...	"	210	
"	27	...	"	211	
"	28—"agent"	...	"	212—"attorney"	
"	29—"agent"	...	"	213—"attorney"	
"	30—"agent"	...	"	214—"attorney"	
"	31—"has attained his majority."		"	215—"Shall have completed the age of 18 years."	
"	32 Do.	...	"	216 Do.	
"	33	...	"	217, which omits minors	
"	34	...	"	218	
"	35—"agent"	...	"	219—"attorney"	

Probate and Administration Act.	Indian Succession Act.
<p>Section 36 ...</p> <p>" 37—"beneficiary" ...</p> <p>" 38—"Suit" ...</p> <p>" 39 ...</p> <p>" 40—"appears" ...</p> <p>" 41—(1) "appears" ...</p> <p>" —(2) "The Judge may appoint" ...</p> <p>" 42 ...</p> <p>" 43 ...</p> <p>" 44 ...</p> <p>" 45 ...</p> <p>" 46 ...</p> <p>" 47 ...</p> <p>" 48 ...</p> <p>" 49 ...</p> <p>" 50 ...</p> <p>" 51 ...</p> <p>" 52 ...</p> <p>" 53 ...</p> <p>" 54—"he" ...</p> <p>" 55 ...</p> <p>" 56—"if it appears" ...</p> <p>" 57—"The Judge may in his discretion refuse" ...</p> <p>" 58—"had his fixed place of abode" ...</p> <p>" 59—"property" ...</p> <p>" 60 ...</p> <p>" 61 ...</p> <p>" 62 ...</p> <p>" 63—"will, copy or draft" ...</p> <p>" 64 ...</p> <p>" 65 ...</p> <p>" 66 ...</p> <p>" 67 ...</p> <p>" 68 ...</p> <p>" 69 ...</p> <p>" 70—"had his fixed place of abode".</p>	<p>Section 220</p> <p>" 221—"person beneficially interested in the property."</p> <p>" 222—"Cause of Suit"</p> <p>" 223</p> <p>" 224—"may appear"</p> <p>" 225—(1) "shall appear"</p> <p>" —(2) "It shall be lawful for the Judge to appoint."</p> <p>" 226</p> <p>" 227</p> <p>" 228</p> <p>" 229</p> <p>" 230</p> <p>" 231</p> <p>" 232</p> <p>" 233</p> <p>" 234</p> <p>" 235</p> <p>" 235 A</p> <p>" 236</p> <p>" 237—"Such person"</p> <p>" 238</p> <p>" 240—"if it shall appear"</p> <p>" 241—"it shall be in the discretion of the Judge to refuse."</p> <p>" 241 A "resided"</p> <p>" 242—"property and estate"</p> <p>" 242 A</p> <p>" 243</p> <p>" 244, which omits "or in the cases mentioned in Ss. 24, 25, and 26, a copy, draft or statement of the contents thereof."</p> <p>" 245—"will"</p> <p>" 246</p> <p>" 246 A</p> <p>" 247</p> <p>" 248</p> <p>" 249</p> <p>" 250</p> <p>" 251—"resided"</p>

Probate and Administration Act.	Indian Succession Act.
Section 71 ...	Section 252
" 72 ...	" 253
" 73 ...	" 253 A
" 74 ...	" 253 B
" 75 ...	" 253 C
" 76—"appears" ...	" 254—"shall appear" ...
" 77 Do Do ...	" 255 Do Do
" 78—"Every person to whom any grant of letters of administration is committed, and, if the Judge so direct, any person to whom probate is granted" ...	" 256—"Every person to whom any grant of letters of administration other than a grant under S. 212 is committed"
" 79 ...	" 257
" 80 ...	" 258
" 81 ...	" 259
" 82 ...	" 260
" 83 ...	" 261
" 84 ...	" 262
" 86 ...	" 263
" 87 ...	" 264
" 88—"and may exercise the same powers for the recovery of debts" ...	" 267—"and to distrain for all rents"
" 89 ...	" 268, which contains also Illus. (b).
" 90, clause 1 ...	" 269
" 91 ...	" 270
" 92 ...	" 271
" 93 ...	" 272, which omits "in the absence of any direction to the contrary in the will or grant of letters of administration"
" 94 ...	" 273
" 95 ...	" 274
" 96 ...	" 275
" 97—"to provide funds for the performance of the necessary funeral ceremonies of the deceased" ...	" 276—"to perform the funeral of the deceased"

Probate and Administration Act.		Indian Succession Act.	
Section 98	...	Section 277	
" 99	...	" 277 A	
" 100	...	" 278	
" 101	...	" 279	
" 102	...	" 280	
" 103	...	" 281, which omits "according to their respective priorities (if any)."	
" 104	...	" 282, which adds in the present para "by reason that his debt is secured by an instrument under seal or on any other account."	
" 105	...	" 285	
" 106	...	" 286	
" 107	...	" 287, which omits "in the absence of any direction to the contrary in the will."	
" 108	...	" 288	
" 109	...	" 289	
" 110	...	" 290	
" 111	...	" 291	
" 112	...	" 292	
" 113	...	" 293	
" 114	...	" 294	
" 115	...	" 295	
" 116	...	" 296	
" 117	...	" 297	
" 118	...	" 298	
" 119	...	" 299	
" 120	...	" 300	
" 121	...	" 301	
" 122	...	" 302	
" 123	...	" 303	
" 124	...	" 304	
" 125	...	" 306	
" 126—"six per cent"	...	" 307, "four per cent."	
" 127	...	" 308	
" 128	...	" 309	
" 129	...	" 310	
" 130	...	" 311	
" 131	...	" 312, which omits "or unless the will contains a direction to the contrary " in the "Exception."	
" 132—"six per cent"	...	" 313—"four per cent."	
" 133	...	" 314	

Probate and Administration Act.	Indian Succession Act.
Section 134 ...	Section 315
" 135 ...	" 316
" 136 ...	" 317
" 137 first para ...	" 318
" 137 second para ...	" 124
" 138 ...	" 319
" 139—"as the High Court may, by any general rule to be made from time to time, prescribe." ...	" 320—"as would have been given by the High Court in an administration-suit."
" 140 ...	" 321
" 141 ...	" 322
" 142 ...	" 323
" 143 ...	" 324
" 144 ...	" 325
" 145 ...	" 326
" 145 A ...	" 326 A
" 146 ...	" 327
" 147 ...	" 328
" 157 ...	" 333



THE PROBATE AND ADMINISTRATION ACT, 1881.

As modified up to 1st March, 1909.

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THE PROBATE AND ADMINISTRATION ACT, 1881.

ACT V OF 1881.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(Received the assent of the Governor-General on the 21st January, 1881.)

N.B.—For convenience of reference, opposite to each Section of the Act in the margin, the corresponding Section of the Indian Succession Act is given in square brackets.

An Act to provide for the grant of Probates of Wills and Letters of Administration to the estates of certain deceased persons.

[As modified up to the 1st March, 1909.]

WHEREAS it is expedient to provide for the grant of probate of wills and letters of administration to the estates of deceased persons in cases to which the Indian Succession Act, 1865, does not apply¹; It is hereby enacted as follows :—

(Notes).

General.

(1) Construction of statutes—General rule.

The meaning of an Act is to be gathered solely by reference to the Act itself.
1 Hyde. 100 : 7 C. 127 = 8 C.L.R. 409. **A**

(2) A Code is generally exhaustive.

(a) The essence of a Code is to be exhaustive on the matters in respect of which it declares the law and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction. 29 C. 707 (715, (P.C.) *Duchess of Kingston's case*; 2 Smith's L.C., 10th Ed., 713. F'). **B**

(b) On points specifically dealt with by the enactments, Courts cannot disregard or go outside the letter of the enactments, but must ascertain the law, by interpreting the language used by the Legislature 3 C. L.J. 67 = 33 C. 927 (931). **C**

(3) Effect to be given to every word.

(a) One of the most elementary principles of the construction of statutes is that, if possible, effect should be given to every word. 29 C. 892 (399). **D**

General—(Continued).

- (b) It is a settled canon of construction that a statute ought to be so construed that, if it can be prevented, no clause, sentence or word, shall be superfluous, void or insignificant. 10 C.L.R. 459=8 C. 637 (640), following; *Reg. v. Bishop of Oxford*, 4 Q.B.D. 261; 15 M.L.J. 116 (F.B.)=28 M. 466; 6 C. 171; 4 C.L.R. 504 (508); 21 C. 319 (400); 12 A. 129 (138) (F.B.). E

(4) Interpretation according to plain meaning.

- (a) The language of a statute, taken in its plain ordinary sense, and not its policy or supposed intention, is the safer guide in construing enactments. *Philpott v. St. George's Hospital*, 6 H.L. Cas. 338, referred to in 1 A. 487 (496). F
- (b) Courts are bound to construe the section of an Act according to the plain meaning of its language, unless either in the section itself or in any other part of the Act, anything is found to modify, qualify or alter the statutory language, even if absurdity or anomaly be the result of such interpretation. 27 C. 11 (15), referring to *Vestry of the Parish of St. John's Hampsted v. Cotton*, (1816) L.R. 12 Ap. Cas. 1 (6); see, also, *Yates v. The Queen*, 14 Q.B.D. 648, referred to in 11 B. 6 (24). G
- (c) In the first instance, the grammatical sense of the words is to be adhered to. If that is contrary to, or inconsistent with, any expressed intention or declared purpose of the statute; or, if it would involve any absurdity, repugnance, or inconsistency in its different provisions, the grammatical sense must then be modified, extended or abridged, so far as to avoid an inconvenience, but no further. 28 C. 744 (748). H

(5) Pre-existing state of law—How far guide in construction.

- (a) The proper course in interpreting an Act, intended to codify a particular branch of the law, is first to examine its language for its natural meaning uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. *Per Lord Herschell in Bank of England v. Vagliano*, L.R. (1891) Ap. Cas. 107, followed in 23 C. 571 (P.C.); 5 C.W.N. 640 (646); 7 C.W.N. 301 (304). I
- (b) In interpreting an Act, Courts should consider not what the law was before it was passed, but what the Legislature has said is to be the law after the passing of that Act. 28 C. 517 (528). J
- (c) To interpret a statute in the light of the previously existing law is to reverse the process of logical ratiocination. 5 C.W.N. 640 (646), following 23 C. 571 (P.C.); see, also, 18 C. 620 (628, 629) (P.C.). K
- (d) The object of codifying a particular branch of the law is that, on any point specifically dealt with, the law should thenceforth be ascertained by interpreting the language used in that enactment, instead of, as before, searching the authorities to discover what may be the law, as laid down in prior decisions. 23 C. 563=23 I.A. 18. L

General—(Continued).

(6) In absence of express provision, Courts to proceed on principles of justice, equity and good conscience.

An Act does not, where no specific provisions exist, affect the power and duty of a Court to act according to justice, equity, and good conscience, though in such cases, it must base its decision on sound general principles, and must not contravene the intentions of the Legislature. 3 C.L.J. 67=33 C. 927. **M**

(7) Preamble, how far guide in construction.

- (a) The purpose for which a preamble is framed to a statute is to indicate, what, in general terms, was the object of the Legislature, in passing the Act. 11 A. 262 (266). **N**
- (b) The preamble of an Act is usually of great importance in construing the extent of the operation of the law and should be read with its sections. 4 C.W.N. ccxvi. **O**
- (c) It is always permissible to refer to the preamble for the purpose of keeping the effect of the Act within its real scope, as it usually states, or professes to state, the intention of the Legislature in passing the enactment. *Traquand v. Board of Trade*, 11 App. Cas. 386; see, also, 9 W.R. 402 (404); 7 C. 333 (336)=9 C.L.R. 209; 6 C. 707 (708)=8 C.L.R. 52. **P**
- (d) But the preamble cannot unless there be something inconsistent with the spirit of the Act, be taken to cut down its express provisions. *Thistleton v. Frewer*, 31 L.J. Ex. 320; *Young v. Hughes*, 4 H. and N. 76. **Q**
- (e) The preamble to a statute can neither expand nor control the scope and application of the enacting clause, when the latter is clear and explicit but if the language of the body of the Act is obscure or ambiguous, the preamble may be consulted as an aid in determining the reasons of the law and the object of the Legislature. 6 Ind. Cas. 259. **R**

(8) Marginal notes, how far guide in construction.

- (a) It is a well-settled rule, that, in English law, the marginal notes cannot be referred to for the purpose of construing an Act. 8 C.W.N. 699 (706)=26 A. 393 (406)=7 O. C. 248 (P.G.). **S**
- (b) The marginal notes to a section do not form part of the enactment and cannot be looked to for the purpose of construing the section. 25 C. 868 (862); 24 B. 120 (122); 23 C. 55 (59); *Claydon v. Green*, L.R. 3 C. p. 511; *A.G. v. G.E. Ry. Co.*, L.R. 11 Ch. D. 449 (465); *Sutton v. Sutton*, L.R. 22 Ch. D. 511. **T**

(9) Illustrations, how far guide in construction.

- (a) Illustrations are only intended to assist the Courts in construing the language of an enactment. *Per Couch, C.J.*, in 22 W.R. 367. **U**
- (b) Illustrations, though not exhaustive, furnish some indication of the presumable intention of the Legislature. 18 B. 491 (496). **V**
- (c) Illustrations may be useful so far as they explain the meaning of the section but must never be allowed to control its plain meaning, especially when the effect would be to curtail a right, which it would, in its ordinary sense, confer. 7 C. 132 (132)=8 C.L.R. 281 (283); see, also, 22 W.R. 367 (368); 28 W.R. 311 (312); 6 C. 171 (185); 5 A. 573 (575). **W**

General—(Continued).

- (d) The illustrations make nothing law which would not be law without them. They only exhibit the law in full action, and show what its effects will be on the events of common life. Whitely Stoke's Anglo-Indian Codes, Vol. I, p. XXV. **X**
- (e) The illustrations are not merely examples of the law in operation, but the law itself, showing by examples what it is. Report of Law Commissioners on the Indian Succession Act. Gazette of India, Extraordinary, 1st July, 1864, p. 53. **Y**

(10) Value of English cases.

In interpreting an Indian Act, help may be derived from the English cases which are as much authoritative as the decisions of the superior Courts of India, and where the Indian law is similar or the same, their authority is conclusive. See 12 Q.B.D. 224. **Z**

(11) Meaning of words—Definition.

- (a) The effect of an interpretation clause is to give the meaning assigned by it to the word interpreted in all places of the Act, in which that word occurs, and not annex to the thing defined every incident attached to it by any other Act of the Legislature. 12 C. 430 (433) ; see, also, 15 A. 141 (143). **A**
- (b) It would be unreasonable to hold that the Legislature used the same word in different senses in the same Act. 22 B. 235 (238). **B**
- (c) A Court is not at liberty to import into an Act definitions provided for the purpose of some other Act. 15 A. 141 (143). **C**
- (d) When certain words in an Act, that have received judicial construction, have been repeated with no alteration in a subsequent statute, the Legislature must be taken to have adopted the same meaning. *Per James, L. J.*, in *Ex parte Campbell*, L. R. 5 Ch. App. Cas. 703, 706 ; referred to in 29 C. 890 (905), 11 C.W.N. 1005 (P.G.). **D**

(12) Courts bound to give effect to expressed intention of Legislature.

- (a) The intention of the Legislature can only be legitimately ascertained from that which it has chosen to enact either in express words or by reasonable and necessary implication. *Per Lord Watson in Saloman v. Saloman*, L R. 1897, Ap. Cas. 38. **E**
- (b) The Court knows nothing of the intention of an Act, except from the words in which it is expressed, applied to the facts existing at the time. *Logan v. Courtown*, 13 Beav. 22, referred to in 1 A. 487 (496). **F**
- (c) The intention must be ascertained from the words of a statute, and not from any general inferences to be drawn from the nature of the objects dealt with by the statute. *Fordyce v. Bridges*, 1 H.L. Cas. p. 1, referred to in 1 A. 487 (496). **G**

(13) Statement of Objects and Reasons, how far guide in construction.

In the judicial construction of Indian, as well as of British, statutes, the proceedings of the Legislature that resulted in their passing, and the state of circumstances under which they were passed, must be excluded from consideration, and the Courts should confine themselves to the bare enactment. 22 C. 788 (798, 799), (P.G.) ; 22 C. 1017 (1032) (F.B.) ; 22 B. 112 (127) ; 21 C. 732, overruled. **H**

General—(Concluded).**(14) Statutes, when retrospective.**

Acts are generally prospective and not retrospective in their operation except,

(a) When they are expressly declared to be retrospective, and

(b) When they only affect the procedure of the Court. 14 B. 516 (525), referring to *Wright v. Hale*, 30 L.J. Ex. 40; *Kimbray v. Draper*, L.R. 3 Q.B. 161; *Moon v. Durdan*, 2 Exch. 22; 5 M.I.A. 109 (126); *Reid v. Reid*, L.R. 31 Ch. D. 408; *Allhuson v. Brooking*, L.R. 26 Ch. D. 564; see, also, 13 C.P.L.R. 143 (144); 8 C.W.N. 201 (206); 6 M.H. C. 122 (126). I

1.—“Cases to which the Indian Succession Act does not apply.”**(1) Hindus, Muhammadans and Buddhists are not governed by the Succession Act.**

S. 331 of the Succession Act X of 1865 declares the Act inapplicable to intestate or testamentary succession to the property of any Hindu, Muhammadan or Buddhist. J

(2) Governor-General is empowered to exempt any race, sect or tribe from the operation of the Succession Act.

S. 332 of the Succession Act X of 1865 empowers the Governor-General to exempt any race, sect or tribe from the operation of the Succession Act. K

CHAPTER I.**PRELIMINARY.**

Short title. 1. This Act may be called the Probate and Administration Act, 1881 1: [Sec. 1.]

Local extent. It applies to the whole of British India 2;

Commencement. and it shall come into force on the first day of April, 1881.

(Notes).**1.—“This Act may be called the Probate and Administration Act.”****(1) History of the law of intestate and testamentary succession in India.**

In 1865, the first Act on this branch of the law was passed, following the lines of English Law, but this Act was expressly made inapplicable to the case of the wills of Hindus, Mahomedans and Buddhists. (See S. 331, Indian Succession Act). In 1870, however, the Legislature felt that it might go further, and accordingly, it passed an Act (XXI of 1870), extending to Hindus, Jains, Sikhs and Buddhists the main provisions of Act X of 1865, but still excepting Mahomedans. In 1881 the Legislature felt it was safe to go further still, and proceeded accordingly, to remove this last exception, and to enact Act V of 1881, which was made as applicable to Mahomedans as to other classes. *Per West, J.*, in 7 B. 266 (270). L

1.—“This Act may be called the Probate and Administration Act”

—(Concluded).

- (2) **State the law at the time of the passing of the Probate and Administration Act.**

“There is, speaking generally, no means of conferring upon any one a complete and conclusive title as representative of the estate of a deceased Hindu, Mahomedan, or Buddhist, or other person exempt from the operation of the Indian Succession Act. The Hindu Wills Act, is at present limited in its operation to the Presidency Towns and Lower Bengal; and even if the proposal to extend it to other parts of British India, now under consideration, is carried out, it will still apply only to cases of testamentary succession among Hindus.” Speech of Sir Whitley Stokes in introducing the Bill for the Probate and Administration Act. **M**

- (3) **Object of the Probate and Administration Act.**

The object seems to have been to frame an Act which would be applicable to all natives of this country, whilst leaving the existing law as to those Hindus to whom the Hindu Wills Act applied, untouched. *Per Sargent, C.J.*, in 8 B. 241 (254). **N**

- (4) **Intention of the Legislature in passing the Probate and Administration Act.**

Looking at the scope and policy of the Probate Act, it is apparent that it was the intention of the Legislature that an estate should not be left unrepresented. 12 C. 375 (378). **O**

2.—“It applies to the whole of British India.”

- (1) **“British India” defined—General Clauses Act.**

“British India” shall mean all territories and places within Her Majesty’s dominions which are for the time being governed by Her Majesty through the Governor-General of India or through any Governor or other officer subordinate to the Governor-General of India. S. 3 (7) of Act X of 1897 (General Clauses). **P**

- (2) **Do.—Indian Succession Act.**

“British India” means the territories which are or may become vested in Her Majesty or her successors by the Statute 21 and 22 Vict. cap. 106 (*An Act for the better Government of India*). See S. 3, Act X of 1897. **Q**

- (3) **“India defined—General Clauses Act.”**

“India” shall mean British India, together with any territories of any Native Prince or Chief under the suzerainty of His Majesty exercised through the Governor-General. S. 3 (27) of Act X of 1897 (General Clauses). **R**

- (4) **India—British India—Difference.**

(a) India, as distinguished from British India, includes the territories of Native States. See 24 & 25 Vict. c. 87, S. 22; 28 & 29 Vict., c. 15, S. 3 etc. cited in Ilbert’s Govt. of India, 2nd Edn., p. 264. **S**

(b) But India in the wider sense, would not include French or Portuguese territory. Ilbert’s Govt. of India, 2nd Edn., p. 265. **T**

- (5) **Aden, if part of British India.**

Aden is part of British India, and is included in the Bombay Presidency. See Aden Laws Regulations (II of 1891). **U**

2.—“It applies to the whole of British India” —(Concluded).

(6) Places where the Act has been declared to be in force.

- (i) In upper Burma, except the Shan states. See the Burma Laws Act, XIII of 1898, S. 4 (1) and Sch. I. **Y**
- (ii) In British Baluchistan. See the British Baluchistan Laws Regulation, I of 1890, S. 3. **W**
- (iii) As regards S. 154, in the Santhal Parganas. See the Santhal Parganas Settlement Regulation, III of 1872, S. 3, as amended by Regulation III of 1899. **X**
- (iv) In the Scheduled Districts of Hazaribagh, Lohardaga, Manbhum, Dhalbhum and the Kolhan. See Notification in Gazette of India, 1881, Pt. I, p. 504 made under S. 3 (a) of the Scheduled Districts Act, XIV of 1874. **Y**
- (v) In the town of Mandalay. See Act XX of 1886. **Z**
- (vi) In the Hyderabad Assigned Districts. See Notification dated 4th Nov. 1881, Gazette of India 1881. Part I, p. 540. **A**

[331, 332.]

Personal applica-
tion.

2. Chapters II to XIII, both inclusive, of [Ss. 331, 332]

this Act shall apply in the case of every Hindu, Muhammadan, Buddhist ¹ and person exempted under section 332 of the Indian Succession Act,

1865 ², dying before, on or after the said first day of April, 1881 :

Provided that nothing herein contained shall be deemed to render invalid any transfer of property duly made before that day :

Provided also that except in cases to which the Hindu Wills Act, 1870 ³, applies,

no Court in any local area beyond the limits of the towns of Calcutta, Madras and Bombay and the territories for the time being administered by the Chief Commissioner of British Burma ⁴,

and no High Court, in exercise of the concurrent jurisdiction over such local area hereby conferred,

shall receive applications for probate or letters of administration ⁵ until the Local Government has, with the previous sanction of the Governor-General in Council, by a notification in the official Gazette, authorized it so to do ⁶.

(Notes).

1.—“Case of every Hindu, Muhammadan, Buddhist.”

(1) Persons to whom the Indian Succession Act is applicable.

- (i) All natives of India other than these comprised in the terms “Hindu, Mahomedan and Buddhist” and not exempted under S. 332 of the Succession Act. Hend. 3rd Ed., p. 2. **B**
-) Europeans domiciled in this country. (*Ibid.*) **C**

I.—“Case of every Hindu, Muhammadan, Buddhist”—(Continued).

- (iii) All Europeans in this country not having an Indian domicile, except in so far as the Succession Act relates to succession to moveable property. (Ibid.) **D**
 - (iv) East Indians or persons of mixed European and native blood. (Ibid.) **E**
 - (v) Native Christians in this country. 2 M. 209; 9 M. 466; 10 M. 69; 7 M.H. C.R. 121; 19 B. 783; 9 M. I. A. 239. **F**
 - (vi) Parsis, in regard only to testamentary succession. Hend., 3rd Ed., p. 2. **G**
 - (vii) Armenians in this country. 1 Fult. 224. **H**
 - (viii) Jews in this country. 1 C. 148 (except in Aden where they have been exempted under S. 332 of the Succession Act). **I**
- (2) Hindus, Muhammadans and Buddhists are not governed by the Succession Act.**

As to this, see S. 331, Act X of 1965; see also 1900 P.L.R. 251 (265); 9 O.C. 159; 10 W.R. 417. **J**

(3) Who are Hindus?

- (a) The term Hindu in the Indian Succession and the Probate and Administration Acts must be understood in a theological sense. This does not mean that the Court is to take upon itself to decide what doctrines do or do not properly belong to Hinduism and thereupon to find whether a particular person was or was not a Hindu. Such an enquiry is obviously impossible for a British Indian Civil Court to institute, and such a decision equally impracticable. The Court must, therefore, proceed upon what is generally understood to be the meaning of the expression. (1900) P.L.R. 268. **K**
- (b) The term “Hindu” is used as a theological term and denotes any person professing any form of Brahminical religion or religion of the Puranas 19 B. 783 (789). *Per Stirling, J. following the opinion of Mr. Stokes in Anglo-Indian Codes, Vol. I, p. 483.* **L**
- (c) It is not sufficient to bring a man within the definition of “Hindu” to prove his Hindu birth and origin. It is also required that he should be a Hindu at the time when the question in issue in the case arises. Thus, in a dispute as to the succession to a deceased person's estate, he should be proved to have been a Hindu at the time of his death. (1900) P.L.R. 251 (268). **M**
- (d) To define the term “Hindu” accurately and at the same time sufficiently comprehensively as well as distinctively is extremely difficult. The Hindu religion is marvellously catholic and elastic. Its theology is marked by asceticism and tolerance and almost unlimited freedom of worship. Thus, though, no trait is more marked of Hindu society, in general, than its horror of using the meat of the cow, yet, it includes within its pale the sect of *chamars* who profess Hinduism and eat beef and the flesh of dead animals. (1900) P.L.R. 251 (263). **N**

(4) Jains, whether Hindus.

- (a) The word “Hindu” in S. 331 of the Indian Succession Act is used in a generic sense and includes Jains. It is now settled law that the ordinary Hindu Law of inheritance is to be applied to Jains in the absence of proof of custom and usage varying that law. 3 A. 55 (58); 4 C. 744. **O**

1.—“*Case of every Hindu, Muhammadan, Buddhist*”—(Continued).

- (b) The personal law of the Jains is the ordinary Hindu Law of the place where they are settled. 23 B. 255 (263). P
- (c) The Jains, in the absence of evidence as to any special custom among them, are governed by the Hindu Law of inheritance applicable in that part of the country in which the property is situate, *viz.*, the Dayabhaga in Lower Bengal generally, the Mitakshara in the Mitakshara Districts, and the Mithila in the Mithila country. 8 W.R. 116 (118). Q
- (d) The Jains are of mostly Vaishya origin; and the ordinary Hindu Law governs succession disputes among them. The word “ordinary” here indicates the general or normal Hindu Law,—the law of the three re-generate castes. As the Jains are mostly Vaishyas, it is plain that the exceptional rules laid down for Sudras can have no place in matters relating to them. 23 B. 257 (264). R
- (e) Succession to property among Jains is regulated by the ordinary Hindu Law, notwithstanding their divergence from Hindus in matters of religion. S
- (f) The Jains constitute a sect of Hindus, differing from the rest in some very important tenets. In other respects they follow a similar practice and maintain like opinions and observances as the Hindus. 10 Bom. H. C. 241 (250). T
- (g) The customs of the Jains, where they are relied upon, must be proved by evidence, as other special customs and usages varying the general law should be proved, and, in the absence of proof, the ordinary law must prevail. 6 I.A. 15 (P.C.). U
- (h) Where no special custom is proved the law to be applied to the Jains is the ordinary Hindu Law. 16 B. 347. V
- (i) But as to some matters, the Jains might be governed by special laws and usages. 1 A. 688 (702) (P.C.). W
- (j) In matters of succession, the Jains are not governed by the Indian Succession Act. 3 A. 55 (6 I.A. 15, F.). X
- (k) See also 31 C. 11 (30) (P.C.). Y
- (5) **Sikhs, whether Hindus.**
- (a) The Sikhs are, at all events, at the present time, regarded only as a sect of Hindus. The Sikhs respect the Hindu pantheon and observe most of the religious rites of Hindus on birth, marriage, death and other occasions. Nanak, the founder of the faith was a Hindu; and Govind Singh, from whom the most prominent and distinguished of the Sikh sects derive their origin was himself a votary of Durga. Sikhs and Hindus intermarry, and it sometimes happens, that, in a family, one brother is Sikh while the other remains a Hindu. (1900) P.L.R. 251 (265). Z
- (b) Sikhs are treated as a sect of Hindus or Gentus, of which they are a dissenting branch. 10 B.H.C. 241 (259). A
- (c) The term Hindu or Gentu, when used in the Regulations, Acts, Statutes and Charters, in which Hindus or Gentus have been declared entitled to the benefit of their own law of succession and of contract, has been largely and liberally construed, so that Sikhs and Jains have been included under the term 10 B.H.C. 241 (259). B
- (d) A Sikh is a “Hindu” within the meaning of that term as used in S. 2 of the Probate and Administration Act, V of 1881. 31 C. 11 (P.C.). C

I.—“Case of every Hindu, Muhammadan, Buddhist”—(Continued).

(6) **Brahmos, whether Hindus.**

(a) The founder of the Brahmo sect was a Hindu who never abjured his ancestral religion. He was a mere reformer and professed to restore the ancient faith to its original purity. Thus, Brahmoism, being a faith of Hindu origin, and considering also the extreme tolerance of Hinduism in matters of mere belief, it cannot be said, that a mere profession of Brahmoism necessarily make a man cease to be a Hindu, unless he also abjures the social rules of Hindus and declares himself not to be a Hindu. (1900) P.L.R. 251 (270). **D**

(b) In the province of Punjab, the fact that a Hindu has become a Brahmo does not ordinarily make any difference in his position among his brother Hindus, and he is treated as a Hindu as before. (1900) P.L.R. 251 (271). **E**

(7) **Non-Aryans, whether Hindus.**

The word “Hindu” as used in S. 331, being a theological term, does not include the non-Aryan natives of India, e.g., the Santhalis, Kols, the sub-Himalayan and other Bhutan tribes, the Nagas of Assam, the Kus, the Gonds, the Bhils, the Rajmahalis, the Khonds of Orissa, the Todas of Nilgirs, the Sonars and other demonolators of Southern India. Stokes’ Succession Act, 201. **F**

(8) **Cutchi Memons, whether Hindus.**

Cutchi Memons, though Muhammadans by religion, are governed by the Hindu law of inheritance. 9 B. 115; 10 B. 1. **G**

(9) **Khojas, whether Hindus.**

Khojas are governed by the Hindu Law of succession and inheritance. 12 B.H. C. 281, 295; 3 B. 34. **H**

(10) **Borahs, whether Hindus.**

Borahs, though Muhammadans in religion, are governed by the Hindu law of succession and inheritance. 20 B. 53. **I**

(11) **Native Christians, whether Hindus.**

Native Christians are not “Hindus” within the meaning of that term as used in S. 331 of the Succession Act. 7 M.H.C.R. 121; 2 M. 209; 19 B. 733 (789); 9 M.L.A. 239; 8 M. 466; 10 M. 69; 9 M. 466; 19 B. 680; 22 T.L.R. 192; 23 T.L.R. 84. **J**

(12) **Whether co-parcenary can be part of the law of a Christian family converted from Hinduism.**

(a) The effect of the Indian Succession Act was to convert vested co-parcenary rights into individual rights, and to subject such rights, in cases of intestacy, to the rules of succession provided by the Act. 10 M. 69 (72); but see 31 B. 25, *infra*. **K**

(b) Co-parcenership and the right of survivorship are incidents peculiar to Hindu law, which law, as far as it affected native Christians, was repealed by the Succession Act. But it did not take away any vested rights. 10 M. 69 (72). **L**

(c) Thus two brothers A and B, belonging to a native Christian family were observing the Hindu law, which governed them before the conversion; and they lived as a co-parcenary from before the passing of the Indian Succession Act. After passing of the Act, A died. *Held*,

1.—“*Case of every Hindu, Muhammadan, Buddhist*”—(Continued).

- (1) that the Act did not take away vested rights.
 - (2) that A had a vested interest on 1st January 1866 (the day on which the Act came into force).
 - (3) that such interest continued to vest in him till his death, when a case of intestacy arose.
 - (4) that this case of intestacy was governed by the Succession Act and not by rules of Hindu law applicable to co-parcenary and survivorship; and,
 - (5) that B could not take the whole estate by survivorship. 10 M. 69 (72). **M**
 - (d) Parcenership can be a part of the law governing the rights of a Christian family converted from the Hindu religion. The decision in 10 M. 69 is erroneous in so far as it is thereby determined that the condition of co-parcenership is disturbed by the Succession Act. 31 B. 25 (29) (10 M. 69, *Diss.*). **N**
 - (e) The purpose of the Indian Succession Act is to amend and define the rules of law applicable to intestate and testamentary succession in British India. It does not purport to enlarge the category of heritable property. So, it does not affect rights of co-parcenership as between those to whom it applies. And S. 93 of the Act actually recognises a joint tenancy with the right of survivorship. 31 B. 25; 10 M. 69 (*Diss.*). **O**
 - (f) A family ceasing to be Hindu in religion may still enjoy their property under Hindu law. 14 W.R. (P.C.) 33, cited in 31 B. 25 at p. 31. **P**
- (13) **Effect of conversion—Whether convert can retain the old law.**
- (a) Though, by the fact of the conversion of a Hindu to Christianity, the Hindu law ceases to have any binding force upon the convert, yet it does not necessarily involve a complete change in relations of the convert in the matter of his rights and interest, and his power over property. The convert, though not bound by Hindu law may, by his course of conduct after conversion show by what law he intended to be governed as to matters of succession, inheritance, etc., 9 M.L.A. 199 (*Abraham v. Abraham*). But see 2 M. 209, noted *infra*. **Q**
 - (b) The rule of law to regulate succession in the case of a Hindu convert to Christianity should be determined by ascertaining the course of his conduct and the usages adhered to by him since his conversion. So where it appeared that he and his family had severed all connection with Hindu society, and to matters relating to social intercourse, marriages, etc., abandoned all caste distinctions, and had thoroughly identified themselves with the members of the religion of their adoption, it is in accordance with justice, equity and good conscience to apply to them the rules of inheritance prescribed by the Indian Succession Act. 36 P.R. 1900. **R**
 - (c) In the case of a Hindu convert to Christianity it is possible that despite a change of religion, a change of law may not take place. As observed by their Lordships of the Privy Council in *Abraham v. Abraham*, “upon the conversion of a Hindu to Christianity, the Hindu law ceases to have any continuing obligatory force upon the convert. He may renounce the old law by which he was bound as he has renounced his old religion, or if he thinks fit, he may abide by the old law, notwithstanding he has renounced the old religion.” 52 P.W.R. 1907. But see 2 M. 209 (211), *infra*. **S**

1.—“*Case of every Hindu, Muhammadan, Buddhist*”—(Continued).

- (d) The Indian Succession Act was not in force at the time when the judgment in *Abraham v. Abraham* was delivered. 52 P.W.R. 1907 (271). **T**
- (e) Certain classes of native Christians strictly retain their old Hindu usages, others retain their usages in a modified form, and others again, wholly abandon those usages. The Christian convert could, before the Indian Succession Act was passed, elect to attach himself to any one of those particular classes, and he would have been governed by the usages of the class to which he so attached himself. 20 B. 53 (56). **But** see 31 B. 25, *supra*. **U**
- (f) The Indian Succession Act governs the succession in Native Christian families. And since the passing of that Act such families have not been at liberty to adhere to the Hindu Law of Succession. The case of *Abraham v. Abraham* shows that, before the passing of the Indian Succession Act, 1865, native Christian converts from the Hindu religion were at liberty to renounce the Hindu Law of Succession or to adhere to it. But now they are bound by the Act. 2 M. 209 (211). **But** see 31 B. 25. **V**
- (g) Native Christian families are not at liberty to adhere to the Hindu Law of Succession since the passing of the Indian Succession Act. 9 M. 466 at p. 471, *following* 2 M. 209; **but** see 31 B. 25, *supra*. **W**
- (h) Where a native Christian, whose family had, up to 1866, observed the Hindu Law of Succession had, by such Law, acquired at his birth an interest in ancestral property, the subsequent enactment of the Succession Act would not divest him of such interest. 2 M. 209. **X**
- (i) Where a native Christian family had, to 1866, observed the Hindu Law of Succession, and where a son born in such a family had acquired at his birth an interest in the ancestral property, it would be open for such son to sue his father and brother for a partition and separation of his share in the family estate. And the subsequent enactment of the Succession Act would not affect his rights. 10 M. 69 (71). **Y**
- (j) Where there is nothing in the conduct of the parties and usages adhered to by them after conversion, to justify the applicability of the rule of justice, equity and good conscience as laid down in S. 6 of the Punjab Laws Act (IV of 1872), the rules of inheritance as prescribed in the Indian Succession Act regulate the succession to property among Native Christian converts from Hinduism. 36 P.R. 1909=1 Ind. Cas. 697. **Z**

(14) Who are Muhammadans.

- (a) In order to determine whether a person is a Mahomedan or not the Courts ought to look at what he professes at the present time, and not at the stock whence he was derived, nor at the fact that he may, in matters of succession and inheritance, be governed by Hindu Law in whole or in part. 19 B. 783 (789). *Per Starling, J.* **A**
- (b) Cutchi Mamons are a class of Mahomedans, although in one point they observe a Hindu usage which is not in accordance with the Mahomedan Law. Such a deviation from Mahomedan Law and usage is not enough to bring them within the term “Hindu.” Marriages among them are celebrated by the Kazi, they attend the Maszid, and they

1.—“Case of every Hindu, Muhammadan, Buddhist”—(Continued).

belong to the sunni division of Mahomedans. Thus, the law applicable to them is the Mahomedan Law, except when an ancient and invariable special custom to the contrary is established. 6 B. 452 (460). **B**

- (c) The rule that in questions of succession and inheritance the Hindu Law is to be applied to Hindus, and the Mahomedan Law to Mahomedans, must be understood to refer to Hindus and Mahomedans, not by birth merely, but by religion also. 9 M.L.A. 195 (243). *Per Lord Kingsdown.* **C**

(15) Whether orthodoxy necessary to make one a Hindu or a Mahomedan.

- (a) In determining whether parties to a suit are Hindus or Mahomedans within the meaning of S. 24 of Act VI of 1871 (Bengal Civil Courts Act) we must apply its terms strictly, and confine their operation to those who may properly be regarded as orthodox believers in the one religion or the other. 4 A. 343 (347). **D**

- (b) The mere circumstance that a person may call himself or be termed by others a Hindu or Mahomedan, as the case may be, is not enough to have the Hindu or Mahomedan Law made the rule of decision in his case. His only claim to have a special kind of law applied to him is that he follows and observes a particular religion, that, of itself, creates his law for him. If he fails to establish his religion, his privilege to the application of its law fails also, and he must be relegated to that class of persons whose cases have to be dealt with according to justice, equity and good conscience. 4 A. 343 (348). **E**

- (c) A Hindu does not cease to be a Hindu in contemplation of law, simply by reason of heterodox practices. Thus, taking food prohibited to Hindus, eating with Christians and Mahomedans, etc., though they involve the social ban, do not amount to renunciation of religion. (1900) P.L.R. 251 (273). **F**

- (d) Although if a Sikh smokes, and cuts his hair, and eats food cooked by Mahomedans and Christians and low caste men, and thereby breaks the ordinances obligatory on him, he may be subjected to social excommunication and religious purification, yet he does not thereby cease to be a Sikh; nor does he cease to be governed by the Hindu Law applicable to him. P.L.R. (1900), 251. *But see* 4 A. 343, *contra.* **G**

- (e) When a man is born a Hindu or Sikh and has not openly renounced his original faith and adopted a hostile one, when he still calls himself a Hindu or Sikh and is so termed or regarded by others, it is practically impossible for the Civil Court to say that he has ceased to be a Hindu or Sikh within the meaning of the law merely because some of his practices in living, or articles of belief are opposed to those of other Hindus or Sikhs. (1900) P.L.R. 251 (276). **H**

(16) Conversion from Hindu to Mahomedan faith—Right to retain Hindu usages.

Whether it is competent for a family converted from the Hindu to the Mahomedan faith to retain for several generations Hindu usages and customs, and by virtue of that retention to set up for itself a special and customary law of inheritance? *Quere.* 10 M.L.A. 511 (538). **I**

1.—“Case of every Hindu, Muhammadan, Buddhist”—(Concluded).

(17) Who are Buddhists.

(a) Confucians and Taoists are not Buddhists and are therefore not exempted by S. 331 from the provisions of the Indian Succession Act. Lower Burma Selected Judgments (1872—1892), p. 135. **J**

(b) “Buddhist” will include the Burmese, the Tibetans and the Lepchas in British India, Stoke’s Succession Act 200; Henderson, 3rd Ed., 374. **K**

(18) Parsis, governed by what law.

(a) In respect of testamentary succession Parsis are governed by the Indian Succession Act. Hend, 3rd Ed., p. 2. **L**

(b) But in respect of intestate succession Parsis are governed by the Parsi Succession Act, XXI of 1865. **M**

(19) Powers regarding grant of Probate of Moulmein Recorder’s Court.

As to this, see notes under S. 12, *infra*. **N**

2.—“Person exempted under section 332 of the Indian Succession Act, 1865.”

(1) Governor-General empowered to exempt any race, sect or tribe from the operation of the Succession Act.

As to this, see S. 332, Act X of 1865. **O**

(2) Classes exempted from the operation of the whole of the Succession Act retrospectively from its passing.

(i) All native Christians in the province of Coorg. See Gazette of India, 1868, 25th July, p. 1094; see, also, 19 B. 783 (789). **P**

(ii) The Jews of Aden. See Gazette of India, 1886, p. 707. **Q**

(iii) The members of the races known as Kahsias and Syntengs in Assam. See Gazette of India, 1877, p. 512. **R**

3.—“Cases to which the Hindu Wills Act, 1870, applies.”

Scope of the Hindu Wills Act.

The Hindu Wills Act, XXI of 1870, applies to the Wills of Hindus, Jainas, Sikhs and Buddhists in the Lower Provinces of Bengal and in the towns of Madras and Bombay. See S. 2, Act XXI of 1870. **S**

4.—“Chief Commissioner of British Burma.”

(1) “British Burma” now means Lower Burma.

“British Burma,” now means Lower Burma. See the Burma Laws Act, XIII of 1898, S. 7. **T**

(2) Chief Commissioner of Burma is now its Lieutenant-Governor.

The Chief Commissioner is now Lieutenant-Governor of Burma. See Proclamation dated 11th April, 1897. Gazette of India, 1897, Pt. I, p. 261. **U**

5.—“ Shall receive applications for probate or letters of administration.”

(1) Jurisdiction of mofussil District Judges to grant probates of Hindu wills before and after the Probate and Administration Act.

- (i) Before the passing of the Probate and Administration Act, mofussil District Courts were held to have no power to grant probate of a Hindu will not governed by the Hindu Wills Act, XXI of 1870. 6 C.L.R. 138. **Y**
- (ii) Since the passing of Act V of 1881, the District Courts have jurisdiction to entertain applications for the grant of probate or letters of administration in respect of wills of Hindus, though made prior to 1870. 14 C. 37. **W**
- (iii) But in the case of Hindu wills executed before 1870, it is not obligatory upon executors or persons claiming letters of administration to obtain such probate or letters of administration before they can establish their right in respect to any property of the deceased in a Court of Justice. For, S. 187 of the Succession Act is not incorporated in the Probate Act. 17 C. 272. **X**

(2) Power of High Court to grant probate of Hindu wills under the Letters Patent.

- (a) In the exercise of their testamentary jurisdiction, the High Courts of Bengal, Madras and Bombay have power to grant probates of the wills of Hindus who die possessing any property within the limits of the ordinary Original Civil Jurisdiction of such Courts. See S. 34 of the Letters Patent of 1865. **Y**
- (b) Such power is not dependent on the place of the death of the testator. 1 Ind. Jur. (N.S.) 10. **Z**

(3) Jurisdiction to grant administration to native estates originally proceeded on the principle of consent.

As to this, see notes under S. 51, *infra*. **A**

6.—“ Until the Local Government, has, with the previous sanction of the Governor-General-in-Council....authorised it so to do.”

Courts authorised to receive applications for probate and letters of administration.

- (i) *Bengal*: (see Calcutta Gazette, 1881, Pt. I, p. 445).
- (a) The High Court at Calcutta, throughout the territories subject to the Lieutenant-Governor of Bengal:
- (b) All District Judges, within the said territories:
- and (c) such Judicial Officers as the High Court may from time to time appoint as District Delegates.
- (ii) *The Andaman and Nicobar Islands*: (see Gazette of India, 1881, Pt. I, p. 214).
- (a) The Court of the Deputy Superintendent.
- and (b) The Court of the Chief Commissioner.
- (iii) *Assam*: (see Assam Manual of Local Rules and Orders, 1893 Ed., p. 180).
- (a) The High Court at Calcutta, throughout Assam:

6.—“Until the Local Government, has, with the previous sanction of the Governor-General-in-Council....authorised it so to do ”—(Concluded).

- (b) All District Judges within the Province ;
and (c) such Judicial Officers as the High Court may from time to time appoint as District Delegates.
- (iv) *The Punjab* : (see Punjab Gazette, 1881, Pt. I, p. 483).
- (a) The Chief Court, throughout the territories administered by the Lieutenant-Governor of the Punjab.
- (b) All District Judges, within the said territories ;
and (c) such Judicial Officers as the Chief Court may from time to time appoint as District Delegates.
- (v) *Madras* : (see Madras List of Local Rules and Orders, 1898 Ed., p. 161).
- (a) The High Court at Madras, throughout the territories subject to the Governor in Council.
- (b) All District Judges, within the said territories ;
and (c) such Judicial Officers as the High Court may from time to time appoint as District Delegates.
- (vi) *The Central Provinces* : (see Central Provinces Gazette, 1904, Pt. III, p. 277).
- (a) The Judicial Commissioner, throughout the territories under the administration of the Chief Commissioner ;
and (b) Every District Court within the Civil District for which it has been established.
- (vii) *Coorg* : (see Coorg District Gazette, 1889, Pt. I, p. 50).
- (a) The Court of the Judicial Commissioner ;
and (b) the Court of the Commissioner.
- (viii) *Bombay* : (see Bombay List of Local Rules and Orders, 1896 Ed., Vol. I, p. 252).
- (a) The High Court at Bombay, throughout the territories subject to the Governor in Council.
- (b) All District Judges, within the said territories ;
and (c) such Judicial Officers as the High Court may from time to time appoint as District Delegates.
- (ix) *Ajmer-Merwara* : (see Gazette of India, 1889, Pt. II, p. 534).
- (a) The Court of the Chief Commissioner ;
and (b) the Court of the Commissioner.
- (x) *The United Provinces* : (see the United Provinces Rules and Orders).
- (a) The High Court at Allahabad, throughout the territories subject to the Lieutenant-Governor.
- (b) The Judicial Commissioner of Oudh, throughout the territories subject to the Chief Commissioner.
- (c) All District Judges, within the United Provinces ;
and (d) such Judicial Officers as the High Court or the Judicial Commissioner may from time to time appoint as District Delegates.
- (xi) *Upper Burma* : (see Burma Gazette, 1897, Pt. I, p. 289).
- (a) The Court of the Judicial Commissioner.
and (b) all District Courts.

Interpretation-
clause.

3. In this Act, unless there be something repugnant in the subject or context,— [Sec. 3.]

“Province 1 : ” “Province” includes any division of British India having a Court of the last resort :

“minor” means any person subject to the Indian Majority Act, 1875, who has not attained his majority within the meaning of that Act, and any other person who has not completed his age of eighteen years ; and
“minor 2 : ”
“minority : ” means the status of any such person :

“will” means the legal declaration of the intentions of the testator with respect to his property, which he desires to be carried into effect after his death .
“will 3 : ”

“codicil” means an instrument made in relation to a will, and explaining, altering or adding to its dispositions. It is considered as forming an additional part of the will :
“codicil 4 : ”

“specific legacy 5 : ” “specific legacy” means a legacy of specified property :

“demonstrative legacy 6 : ” “demonstrative legacy” means a legacy directed to be paid out of specified property :

“probate” means the copy of a will certified under the seal of a Court of competent jurisdiction, with a grant of administration to the estate of the testator :
“probate 7 : ”

“executor 8 : ” “executor” means a person to whom the execution of the last will of a deceased person is, by the testator’s appointment, confided :

“administrator” means a person appointed by competent authority to administer the estate of a deceased person when there is no executor : and
“administrator 9 : ”

“District Judge 10 : ” “District Judge” means the Judge of a principal civil court of original jurisdiction.

1.—“Province.”

(1) Definition same as in the Succession Act.

The definition of “Province” in this Act is the same as that given in S. 3 of the succession Act, X of 1865. C to E

(2) “Province” defined—General Clauses Act.

“Province” shall mean the territories for the time being administered by any local Government. S. 3 (43) of Act X of 1897 (General Clauses). F

(3) Assam, whether Province.

(a) Assam does not come within the definition of a Province, but of a District for the purposes of this Act. 12 W. R. 424 (425). G

(b) There is now a separate Province known as Eastern Bengal and Assam under a Lieutenant Governor. Hend. p. 3. H

2.—“Minor,” “Minority.”

(1) Definition different from that in the Succession Act.

(a) The definition of “Minor” in this Act is somewhat different from that given in S. 3 of the Succession Act, X of 1865. I

(b) The Succession Act defines “minor” as any person who shall not have completed the age of eighteen years. See S. 3, Act X of 1865. J

(2) Age of majority of persons domiciled in British India—General Clauses Act.

(a) Every minor of whose person or property or both, a guardian, other than a guardian for a suit within the meaning of Chapter XXXI of the Code of Civil Procedure, has been or shall be appointed or declared by any Court of Justice before the minor has attained the age of 18 years, and every minor of whose property the superintendence has been or shall be assumed by any Court of Wards before the minor has attained that age shall, notwithstanding anything contained in the Indian Succession Act (No. X of 1865), or in any other enactment, be deemed to have attained his majority when he shall have completed his age of twenty-one years and not before. S. 3 of Act IX of 1875 (Indian Majority). K

(b) Every other person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before. S. 3 of Act IX of 1875 (Indian Majority). L

(3) Period of minority under the definition same for all persons whether domiciled in British India or not.

(a) S. 3 of the Probate and Administration Act fixes the limit of the period of disability for the purpose of the Act, not only for persons domiciled in British India, but for any other persons whether they be aliens or not. 21 C. 91. M

(b) So an alien, *e.g.*, a native of the State of Bikanir seeking the authority of the British Court in India by an application for letters of administration for the purpose of dealing with property in British India must be of the age of 18 years, whatever be the law of majority of his State. (*Ibid.*) N

2.—“Minor,” “Minority”—(Concluded).

(4) Age of majority, how computed.

In computing the age of any person, the day, on which he was born is to be included as a whole day, and he shall be deemed to have attained majority, if he falls within the first paragraph of S. 3 of Act IX of 1875, at the beginning of the twenty-first anniversary of that day, and if he falls within the second paragraph of S. 3, at the beginning of the eighteenth anniversary of that day. S. 4 of Act IX of 1875 (Indian Majority). O

(5) Age of majority, how computed—English Law.

In computing the age of a person for testamentary or other purposes, the day of his birth is included; thus, if he were born on the 16th of January, 1800, he would have attained his majority on the 15th of January, 1821; and as the law does not recognise fractions of a day, the age would be attained at the first instant of the latter day. *Herbert v. Torball*, 1 Sid. 162; and *Lester v. Garland*, 15 Ves. 257; cited in *Jarman on Wills*, 2nd Ed., Vol. I, p. 94. P

(6) Girl's father born at sea—His parents unknown—Her age of majority.

The father of a girl was born at sea and lived the greater part of his life in Calcutta. It was not shown of what country his parents were, or whether the ship in which he was born was a British ship. *Held*, that the daughter was not a European British subject, and so, that she could not be exempted from the operation of Act XL of 1858, and that she attained her majority on the completion of the 18th year. 8 B.L.R. 372 (406, 407). Q

(7) Wherever guardian appointed under the Guardian and Wards Act, minority extends to 21.

Where a guardian has been validly appointed or declared under the Guardians and Wards Act, the minority of the ward does not cease till he attains 21, whether the guardian dies or is removed, or otherwise ceases to act. 6 Ind. Cas. 6. R

(8) An order for certificate of guardianship even without a formal grant extends minority to 21.

Where a person obtains an order for a certificate of guardianship of a minor, under Act XX of 1864, the minor attains his majority when he completes 21 under S. 3 of the Indian Majority Act, IX of 1875, even though no formal certificate of guardianship is obtained. 31 B. 80 = 8 Bom. L.R. 397. S

3.—“Will.”

(1) Definition same as in the Succession Act.

The definition of “Will” in this Act is the same as that given in S. 3 of the Indian Succession Act, X of 1865. T

(2) “Will,” definition of.

(a) “Will,” shall include a codicil and every writing making a voluntary posthumous disposition of property. S. 3 (57), Act X of 1897 (General Clauses). U

3.—“Will”—(Continued).

- (b) A will is defined by the Oudh Estates Act, I of 1869, as the legal declaration of the intentions of the testator with respect to his property affected by that Act, which he desires to be carried into effect after his death. **Y**
- (c) A will is an instrument by which a person makes a disposition of his property to take effect after his decease, and which is in its own nature ambulatory and revocable during his life. 1 Jarm. 5th Ed., p. 18. **W**
- (d) So where the *Mohunt* of an *Akhara* appointed by a document certain persons as trustees and *Pujaris*, but did not name any successor as *Mohunt* in his place, held, that it amounted simply to a letter of appointment, and as there was no disposition of any property, it was not a will within the meaning of the definition of that word in the Probate and Administration Act. 1 Ind. Cas. 216. **X**
- (3) Document of a *Mohunt* dealing with property belonging to the idol and not to himself is not a will.

A document executed by the *Mohunt* of an idol dealing with property to which the *Mohunt* himself had no right and providing for the succession to the *Mohuntship* after his death, with a right in certain persons to dismiss the *Mohunt* for misconduct was held not a will within the definition in the Succession Act (or the Probate Act). 5 Ind. Cas. 149. **Y**

(4) Who are capable of making wills.

Every person of sound mind and not a minor may dispose of his property by will. See S. 46, Succession Act, X of 1865. **Z**

(5) No technical words necessary.

- (a) No technical words are necessary for a will. It is immaterial what the form of a document may be. If it embodies the legal declarations of the intentions of the testator with respect to his property, which he desires to be carried into effect after his death, it is a will. 86 C. 149 (156); see, also, 1 Jarm. 5th Ed., p. 19. **A**
- (b) It is not necessary that any technical words or terms of art shall be used in a will, but only that the wording shall be such that the intentions of the testator can be known therefrom. S. 61, Act X of 1865. **B**

(6) Form of instrument does not affect validity of will.

- (a) The form of a paper does not affect its title to probate provided that it is the intention of the deceased that it should operate after his death. *Masterman v. Maberly*, 2 Hagg. 235. (Cited in 4 C. 721; 36 C. 149 at 156; see, also, *Glynn v. Oglander*, 2 Hagg. 432. **C**
- (b) It is not necessary that the directions contained in documents allowed to operate as testamentary should be in direct and imperative terms. Williams on executors, 10th Ed., p. 84. **D**

Instruments held to be wills.

A.—ENGLISH CASES.

- (i) An assignment of a bond by endorsement *Musgrave v. Down*, T.T. 1784, cited in 2 Hagg. 247. **E**
- (ii) Receipts for stock and bills endorsed. *Sabine v. Goate and Church*, 1782, Cited. 2 Hagg. 247. **F**

3.—“Will”—(Continued).

- (iii) Marriage articles. *Marnell v. Walton*, T.T. 1796, *Cit.* 2 Hagg. 247. **G**
- (iv) A letter containing dispositions of property to take effect after death may be allowed to operate as a will. *Denny v. Barton*, 2 Phillim. 575. **H**
- (v) Orders given to a banker or to a savings bank, if they contain a testamentary intention, may be allowed to operate as wills. *In bonis Marsden*, 1 Sw. and T. 542. **I**
- (vi) A cheque intended to take effect after death may be allowed to operate as a will. *Bartholomew v. Henley*, 3 Phillim. 317. **J**
- (vii) An instrument which the testator desires to take effect two years after the death of his wife if she should survive him was allowed to take effect as his will. *In bonis News*, 7 Jur. N. S. 688. **K**
- (viii) A paper containing the wishes and the dying request of the testator was treated as a will. *In bonis Lowry*, 5 N. of C. 619. **L**
- (ix) A deed of gift intended to take effect after death would operate as a will. *Habergham v. Vincent*, 2 Ves. J. 204. **M**

B.—INDIAN CASES.

- (i) A petition presented to the Collector, if it contains depositions of a testamentary character, may operate as a will. 22 W.R. 409. **N**
- (ii) A statement made by a Hindu widow before, and recorded by, the Revenue Court, if intended to operate as a will in respect of the property comprised in such statement, will take effect as such. 7 A. 163. **O**
- (iii) Statements recorded in a *wajib-ul-arz* may amount to a testamentary bequest. 19 A. 16 (18) ; 28 A. 488. **P**
- (iv) A deed of settlement “as to what should be done by my adopted son and my wife after my life-time” may operate as a will. 12 M. 490. **Q**
- (v) An *Angikar-patro* may operate as a will. 11 C. 463. **R**
- (vi) A *Dan Unnoomottee putro*, if it is testamentary in its character, may operate as a will. 15 W.R. 41 (P.C.) (43). **S**
- (vii) A *sambandha-niraya patra* (matrimonial arrangement deed) attested by two or more witnesses dividing property (in favour of a person marrying the daughter of the executant of the deed) to take effect after the death of the executant and his wife, operates as a valid will of the executant. 36 C. 149. **T**
- (viii) A written statement by an Oudh Talukdar in reply to the inquiries by Government, issued in the districts under circular orders regarding the succession of Talukdars may come within the definition of a Talukdar's will in S. 2 of Oudh Estate's Act, I of 1869. 17 I.A. 82 = 18 C. 1, *follo.* 3 I.A. 259. **U**
- (ix) A declaration of the heir made by an Oudh Talukdar in answer to the usual inquiries by the Officers of the Government, was held to be testamentary. 26 I.A. 194. **Y**

3.—“WILL” —(Continued).

- (x) A letter written shortly before the testator's death, containing directions as to his property to take effect on his death, is a will under Muhammadan law. 21 A. 91 (P.C.). W

N.B.—Provided they be executed and attested in accordance with the Hindu Wills Act, there seems to be no reason why similar documents should not be treated as “will” under the Hindu Wills Act. Phil. & Trev. Hindu Wills, p. 260.

(7) The name of the instrument, is not important in determining whether it is a will or not.

- (a) If the conduct of the testator and the provisions of the document show that the intention was purely testamentary the name of the document will not be very important. 5 B. 630 (636). X
- (b) In determining whether a document is a will or not it is the substance of the transaction that ought to be taken as a guide. Thus, although a document be styled a deed of settlement, yet, if it was clearly intended to take effect after the death of the person executing the document it may be regarded as a will. 12 M. 490 (492). Y

(8) The instrument must have reference to the death of the person executing it.

- (a) But it must be remembered that if the instrument is not shown to have reference to the death of the person executing it, it cannot be allowed to take effect as a will. *Glynn v. Oglander*, 2 Hag. 428 ; *Habergham v. Vincent*, 2 Ves. 204 (231). *In the goods of Morgan*, L.R. 1 P. & D. 214. Z
- (b) The test is, whether the disposition made takes effect during the life-time of the executant of the deed, or after his death. If the latter, it is ambulatory and revocable during his life. 3 Ind. Cas. 380. A
- (c) Thus memoranda in a book written by the testator in his own hand-writing after the date of the will, directing certain disposition of his property, one entry of which referred in express terms to the will were held not to be testamentary in their character, and, as such, could not be admitted to probate. 4 C. 721. B
- (d) Thus, also, where a document contemplated a present transfer of the property comprised therein to the donee, and management of such property by him, and possession was also delivered to him, such facts, combined with the fact that the instrument was designated a deed, may show that the document was intended to operate as a conveyance and not as a will. 5 B. 630 (636). C

(9) Revocable character of will.

- (a) A will is in all cases revocable, even though the testator may declare it to be irrevocable. *Vinyor's case*, 8 Rep. 82. D
- (b) In ascertaining whether a document is a will, one of the tests is to ascertain whether the document is revocable or not. The irrevocability of a document is perfectly inconsistent with its being a will. 8 C.W.N. 614=3 C.L.J. 370 ; see, also, 20 M.L.J. 519. See, also, *in the goods of Robinson*, L.R. 1 P. & D. 385 at p. 387 ; *per Lord Penzance*, *In the goods of Coles*, L.R. 2 P. & D. 362. E

3.—“WILL”—(Continued).

(c) A document which contains directions regarding the executant's property after his death, which in certain circumstances, may be revoked, is a will. 12 C.W.N. 942. **F**

(d) The will of a living man does not come into operation when it has been executed, but only upon his death. So long as a testator is living he may at any moment cancel his will and make a totally different disposition of his property. This power he possesses up to the hour of his death, provided he be competent then to execute a valid will. 27 A. 14 at p. 15. **G**

(e) If an instrument is on the face of it of a testamentary character, the mere circumstance that the testator calls it irrevocable, does not alter its quality. 3 Ind. Cas. 380. **H**

(f) A statement in a will that the testator will not be at liberty to settle properties absolutely, is absolutely void as being a restraint upon his own power of alienation, and does not indicate any intention to make the deed irrevocable. 3 Ind. Cas. 380. **I**

(10) A Will is *ambulatory*.

A Will is, therefore, said to be *ambulatory*, until the death of the testator. 1 Will. Exors., 10th Ed., p. 94. **J**

(11) No suit for cancellation of will during lifetime of testator.

No suit for the cancellation of a will can lie in the life-time of the testator. 27 A. 14. **K**

(12) Insertion of clause of revocation—Effect.

The insertion of a clause of revocation in an instrument, so far from indicating an intention to make a will, gives quite a contrary colour to the transaction, as a will does not require an express power to render it revocable. Jarman on Wills, cited in 20 B. 213 (214). **L**

(13) Will, how distinguished from settlement.

The most important test in distinguishing a settlement from a will is to see whether the instrument was intended to have an immediate operation or operation after death. 20 B. 210 (213). **M**

(14) A document may operate as a will only in part.

(a) Where certain portions of a document contain a legal declaration of the intentions of the testator, which the testator desires to be carried into effect after his death, and where certain other portions of the same document contain provisions which the testator desires to be carried into effect during his life-time, it was held that the former portion amounted to a will within the meaning of S. 3 of the Probate and Administration Act, 1881. 22 A. 162. **N**

(b) There is no objection to one part of an instrument operating *in presenti* as a deed, and another *in futuro* as a will. *Doe d. Elizabeth Cross v. Arthur Cross*, (1846) 8 Q.B. 714 (cited in 22 A. 164). See, also, *Peacock v. Monk*, 1 Ves. 127; *Bagnall v. Downing*, 2 Lee, 3. **O**

3.—“Will”—(Continued).

- (15) If one part of instrument is testamentary, the rest may be presumed to be also testamentary.

If one part of a document is testamentary in its character, it may be presumed that the remainder, if the language is capable of that construction, is also intended to be testamentary. 4 C.L.R. 401 (403). P

- (16) A document may operate as will only on the happening of a certain event.

A document may operate as a will only on the happening of a certain event, as “if I die of this sickness and C survive me, then whatever property I have shall be given to C,” &c. 2 Indian Jurist, N.S. 6. See, also, *In the goods of Porter*, L.R. 2 P. and D. 22; *In the goods of Robinson*, L.R. 2 P. and D. 171. *In the goods of Mayd*, 6 P.D. 17. Q

- (17) Reservation of life interest in donor—Effect.

A reservation of life-interest in the donor does not by itself show that the document is not testamentary. Testators often express a great anxiety that they should not be considered to have parted with anything in their life-time. And documents which most unquestionably are wills, and intended to operate as such, contain expressions intimating that the testator intends to remain the owner of the property until he dies. 10 C. 792 (802). R

- (18) Instrument not made will by postponing enjoyment.

An instrument is not testamentary merely because actual enjoyment under it is postponed until after the donor's death. If it has present effect in fixing the terms of that future enjoyment, and therefore does not require the death of the alleged testator for its consummation, it is not a will. 1 Jarm. 5th Ed., 25. S

- (19) A statement in a will postponing partition does not make a testamentary gift.

A statement in a will postponing partition of the testator's property and giving directions for management in the meantime does not amount to a testamentary gift. 36 C. 75=12 C.W.N. 1002; 12 C. 165. T

- (20) Instructions for will.

A duly executed instrument described as instructions for a will, may have effect as will, if it appears that it was intended to take effect in the absence of a more formal instrument. *Bone v. Spear*, 1 Phillim. 345. U

- (21) Blank spaces in the middle do not affect validity of wills.

The validity of a will is not affected by reason of blank spaces having been left in it. *Corney v. Gibbons* 1 Rob. 705. *In the goods of Hirby*, 1 Rob. 709. Y

- (22) Language of a will.

(a) It is immaterial in what language a will is written. *Swinburne*, Pt. 4, S. 25, p. 3, cited in 1 Will. Exors., 10th Ed., 85. W

(b) The directions in a will as to the disposition of property need not be in direct and imperative terms. Wishes and requests have been deemed sufficient. See *Passmore v. Passmore*, 1 Phillim. 218 and other cases, cited in 1 Will. Exors., 10th Ed., p. 84. X

3.—“ Will ”—(Continued).

(23) Matter in which a will may be written.

(a) A will may be written on any substance upon which letters, figures or marks may be written or impressed. *Majumdar's Hindu Wills Act*, p. 104. Y

(b) A will was written on a palm leaf in 1 M.H.C.R. 326. Z

(24) Wills may be written in pencil.

(a) A will may be written in pencil. *Bateman v. Pennington*, 3 Moo. P.C.C. 223. A

(b) Where the part of a will written in pencil appears to be deliberative only, as where queries are placed in the margin, such part must be omitted from the probate. *In the goods of Hall*, L.R. 2 P. & D. 256; *In the goods of Adams*, L.R. 2 P. & D. p. 367. B

(c) And the general presumption appears to be, that where alterations are made in pencil, they are deliberative; where in ink, final and absolute. *Hawkes v. Hawkes*, 1 Hagg 321, 1 Will. Exors., 10th Edn., p. 99. C

(25) In wills no attention to be paid to punctuation.

In wills, as in deeds, no attention is to be paid to punctuation or to a parenthesis. *Sandford v. Raikes*, 1 Mer. 651; *Griffiths v. Grieve*, 1 J. & W. 35. D

(26) Testator signing in attestation clause—Intention to execute—Proper execution.

Where the testator signed his name in the attestation clause, but really wanted thereby to execute the will, it was held that such a signing was a proper execution of the will. Even though the paper used was a printed form of will, imperfectly filled in, and the testator had not appended his name and description at the head of the document and did not append his signature to it. 24 C. 784. E

(27) Will may be written wholly by testator—Signing not necessary.

A will may be written wholly by the testator in his own handwriting. In such a case it need not be signed or attested. See S. 63, *infra*. F

(28) Nuncupative will under Hindu law—Validity.

(a) A nuncupative will by a Hindu would be quite effectual, except in the cases governed by Act XXI of 1870. 11 B. 89; 10 M. 251; 7 A. 163; 3 W.R. 138. G

(b) No particular formalities are required in the execution of a will by a Hindu. All that is necessary to be shown is that the will is a complete instrument, and that it expresses the deliberate intention of the testator. 6 B.H.C. 224 (228). following 1 B.H.C.R. 77; 2 M.H.C.R. 37. H

(c) There is no transaction of a Hindu which absolutely requires writing. Contracts of every description, involving both temporal and spiritual consequences, may be made orally. Hence a nuncupative will made by a Hindu would be valid both as regards his moveable and immoveable property. 2 M.H.C. 37 (39). 12 M.I.A. 1. I

3.—“Will”—(Continued).

- (d) In this country there are no formalities to be gone through in order to constitute a valid will, and all that is required is that the intention of the testator should be ascertained in whatever way it may be ascertained, whether by word of mouth or in writing, clearly and unmistakably. 8 W.R. 455 (457). J
- (e) A nuncupative will or a verbal bequest, of his separate property, made by a separated Hindu, beyond the limits of the ordinary original jurisdiction of the High Court of Bombay, and not relating to any immovable property to which the Hindu Wills Act XXI of 1870 applies, is valid. 1 B. 641; 3 B.H.C.R. A.C.J. 6; 2 M.I.A. 54; 6 M.I.A. 309; 12 M.I.A. 1; 2 M.H.C.R. 37; 3 W.R. 138; 8 W.R. 455; 6 B.H.C.A. C.J. 224, *referred to*. K

(29) Nuncupative will of a Hindu, proof of.

Where a person rests his title on the uncertain foundation of a nuncupative will, he is bound to allege, as well as to prove, with the utmost precision, the words on which he relies, with every circumstance of time and place. 12 M.I.A. (128). L

(30) Will of a Hindu—Formalities required by English Law not necessary.

- (a) In judging as to the validity of a Hindu will the Court is not to be guided by the formality which the English Law requires in the case of a will made by an English testator. Such law is not made applicable to testaments executed by a Hindu in this country. 6 B.H.C. 224 (228). See also 6 M.I.A. 526, 550; 2 B. at 408. M
- (b) Courts of Justice in this country ought not to judge the language used by a Hindu, according to the artificial rules, which have been applied to the language of people, who live under a different system of law, and in a different state of society. 36 C. 149 at p. 156. N
- (c) Thus, where a Hindu, a few hours before his death, and in contemplation of death, gave a Government pro-note into the hands of the plaintiff with the clear intention of passing the property therein to him, but abstained from making the endorsement because of physical weakness, it was *held* that the transaction amounted to a nuncupative will as to the Government pro-note concerned. 12 W.R.O.C. 4 (7). O
- (d) A will of a Hindu in writing signed by him but not attested by witnesses is to be admitted to probate, and operates to pass not only moveable but also immovable property. Wills by Hindus are valid without attestation. 1 B.H.C.R. 77. P

(31) Manner of execution of wills governed by the Indian Succession Act or the Hindu Wills Act.

As to this, see S. 50 of the Indian Succession Act, X of 1865. Q

(32) Manner of revocation of wills governed by the Indian Succession Act on the Hindu Wills Act.

As to this, See S. 57, Act X of 1865 and S. 3, Act XXI of 1870. R

(33) Parol revocation of will of a Hindu, valid.

- (a) The will of a Hindu may be revoked by parol; and where definite authority (oral or written) is given to a person by the testator to destroy

3.—“Will”—(Continued).

his will, with the intention of revoking it, that is in law a sufficient revocation, although the instrument is not in fact destroyed. 3 C. 626 (P.C.) = 1 C.L.R. 113 = 4 I.A. 228, following *Walcott v. Ochlerlony*, 1 Curt. 580. **S**

- (b) Actual destruction or formal revocation in writing is not essential to constitute revocation of a Hindu Will. So, where a sick man made his Will and registered and deposited it in the office of the District Registrar and on recovering from his illness, executed a power of attorney appointing a vakil to obtain the Will back out of the Registry and restore it to him, which however was not done, and there was some evidence to show that he believed that he had destroyed it. *Held*, the Will must be treated as revoked. 25 M. 678 (P.C.), following 4 I. A. 228 (245) = 3 C. 626 (643). **T**

(34) Conditional will.

- (a) Where a will is clearly expressed to be conditional upon the testator's death before a given period, such as return from a voyage or a military expedition or the like, the will does not take effect if the condition is not fulfilled. *Parsons v. Laneo*, 1 Ves. Sen. 189; *In bonis Winn* 2 Sw. & T. 147; *Roberts v. Roberts*, *Ibid.* 337; *In bonis Porter*, 2 P. & D. 22; see, also, 2 Ind. Jur. N.S. 6. **U**
- (b) But if the will is so expressed as to show that the contingency is the motive which induces the testator to make the will, the will is not conditional. *Burton v. Collingwood*, 4 Hag. 176; *In bonis Terne*, 4 Sw. and T. 36; *In bonis Maya*, 69 P.D. 17. **Y**
- (c) It may also be gathered from the disposition of property and other circumstances that a will expressed to be conditional was intended to take effect without regard to the condition. *In bonis Martin*, 1 P. and D. 880; *In bonis Spratt*, 1897, P. 28. **W**
- (d) There is nothing to prevent a man from saying that the question whether or not a paper shall be operative or otherwise shall be dependant upon an event to happen after his death. *In the goods of Smith*, L.R. 1 P. and D., p. 717. **X**

(35) Contingent Will distinguished from Will giving the reason for it.

If the Will is really made dependent on the contingency occurring, its validity will depend upon the happening of the contingent event. But if the contemplated possible event is merely the reason of the making of the Will, it will be valid in any event. I Will. Exors., 10th Ed., 136. **Y**

(36) Joint wills.

- (a) Persons may make joint wills, and it is now settled that they are valid. *Hend.*, 3rd Edn., p. 43. **Z**
- (b) A joint will is ordinarily looked upon as the will of each testator and may be proved on the death of one. *In bonis Stracey*, 1 Jur. N.S. 1197; *In bonis Miskelly* 1 R. 4 Eq. 62; *In bonis Piazza Smit*, 77 L.T. 375. **A**
- (c) A joint will may also be made to take effect after the death of both testators, in which case probate will be granted on the death of all. *In bonis Raine*, 1 Sw. and T. 144; *In the goods of Lovegrove*, 2 Sw. and T. 453. **B**

3.—“Will”—(Continued).

- (d) A joint will is revocable at any time by any of the executants or by the survivor. *Hobson v. Blackburn*, 1 Add. 274; *In bonis Stracey Dea & S. 6*; *In bonis Lovegrove*, 2 Sw. & T. 453; *In bonis Fletcher*, 11 L. R. 359. C

(37) Mutual wills.

- (a) A mutual or reciprocal will is where two persons in one and the same writing, or in separate writing, constitute each other their heirs or legatees. Such a will is valid; but it is, in effect, two wills. *Dias v. De Lievera*, 5 Ap. Cas. 123 (P.C.). D

- (b) Mutual wills are revocable during the joint lives of the parties by giving notice to the other, but becomes irrevocable after the death of one of them, if the survivor takes advantage of the provisions made by the other. *Dufour v. Pereira*, 1 Dick 419; *Walpole v. Lord Orford*, 3 Ves. 402; *Dennyson v. Mosterl*, L.R. 4 P.C. 236; *Dias v. De Lievera*, 5 Ap. Cas. 123 (P.C.). E

- (c) To make a mutual will irrevocable by one after the death of the other party the advantage taken by the survivor, should be one taken under the provisions of the will: otherwise the will is revocable by the survivor. 20 M.L.J. 339. F

- (d) Where a husband and wife made mutual Wills in accordance with an arrangement, and the wife died first, after having made a fresh Will without the knowledge of the husband, which departed from the arrangement. On application for probate by the executor of the wife's Will, the husband contended that the executor should hold the property subject to the trust of the arrangement, held, overruling the contention, that it was open to the husband to revoke his own Will. *Stone v. Hoskins*, (1905), P. 194. G

- (e) Where two persons make mutual wills, the marriage of one of them does not revoke the will of the other. *Hinklea v. Simmons*, 4 Ves. 160; *Dias v. Lievera*, 5 Ap. Cas. 123. H

- (f) A mutual and conjoint will, may, in some cases, be enforced in equity as a compact. *Dufour v. Pereira*, 1 Dick 419; *Walpole v. Lord Orford*, 3 Ves. 402; *Dennyson v. Mosterl*, L.R. 4 P.C. 236; *Dias v. De Lievera*, 5 Ap. Cas. 123. I

(38) Holograph will.

A holograph will is one which is wholly in the handwriting of the testator. For examples, see 25 C. 65; 15 M. 380. J

(39) Inofficious testaments—Their effect.

- (a) English Law, unlike Roman Law, does not set aside a testament as being *Inofficiosa*, or deficient in natural duty—if there is satisfactory proof of the testator's knowledge and approval of the contents of the Will. 1 Will. Exors., 10th Ed., p. 25. K

- (b) It is not necessary that there should be an express declaration of the testator's intention to disinherit his heir, if there is an actual gift to some other person. See 10 B.L.R. 267; 19 W.R. (C. R.) 48; 10 B.L.R. 271 (n). L

3.—“Will” —(Continued).

- (c) When a document propounded as a will is proved to have been executed and registered by the alleged testator, it is still essential to inquire into the circumstances connected with its execution and registration when the Will is *inofficious*, and there are other suspicious matters connected with it. 10 W.R. 32. **M**
- (d) Where a Judge concluded that a will was a forgery primarily from a consideration of its contents which he thought to be so extraordinary as to overbalance the evidence of witnesses who spoke to having been present and seen the testator sign, and having themselves signed as witnesses, *held*, that the method of procedure was erroneous. It was not permissible to the Judge first to make up his mind as to contents of a Will and then look at the positive evidence in favour of its execution from that standpoint. 9 C.W.N. 649. **N**
- (40) **Statement as to a past transaction—Not a will.**
A statement in a will that the testator has, at a former time, given away, or set apart property to charity is not a testamentary devise. 31 B. 250 = 9 Bom. L.R. 91. **O**
- (41) **Contract to make a will—Validity.**
A contract to make a will is valid and is, according to English Law, specifically enforceable in equity. *Coles v. Pilkington*, 19 Eq. 174. **P**
- (42) **Contract not to revoke a will—Validity.**
(a) Although a will is always revocable notwithstanding a contract not to revoke it, yet, such a contract is not illegal and is binding if made for good consideration and in such form as to comply with the Statute of Frauds; and damages are recoverable for a breach thereof, though it cannot be specifically enforced. *Hammersley v. De Biel*, 12 Cl. and F. 45; *Robinson v. Ommamney*, 23 C. & D. 285; *Re Parkin Hill v. Schwarz*, 1892, 3 Ch. 510. **Q**
(b) But a mere representation of intention, as distinguished from a contract, is not binding, although such representation may have been intended to influence the conduct and action of the contemplated beneficiary and in fact have been acted on by him. *Maddison v. Alderson*, 8 A.C. 467, *disapproving*; *Loffus v. Maw*, 3 Giff. 592; *cited in I Will. Exors.*, 10th. Ed., p. 96. **R**
- (43) **General rule as to construction of will.**
The meaning of any clause in a will is to be collected from the entire instrument and all its parts are to be construed with reference to each other and for this purpose a codicil is to be considered as part of the will. See S. 69, Act X of 1865. **S**
- (44) **Construction of will—By what law governed.**
(a) In the case of a Will devising immoveable property, it is the locality of the devised property alone that determines the law which is to govern a Will both as to its execution and construction. See 20 B. 607. **T**
(b) Where the property bequeathed is moveable, the *lex domicilii* must prevail. See S. 5 of the Succession Act, X of 1865, and Theob, 6th Ed., p. 4. **U**
(c) Where the testator has no ascertained domicile, as in the case of bastards, the Will is to be interpreted by principles of natural justice, equity and good conscience. 13 M.L.A. 277 = 5 B.L.R. (P.C.) 1. **Y**

3.—“Will”—(Concluded).

(45) Registration of Wills.

- (a) Registration of Wills is not compulsory. S. 17 Act III of 1877. But see S. 13, Oudh Estates Act I of 1869. **W**
- (b) Wills may be presented for registration at any time. S. 27, *Ibid.* **X**
- (c) Wills may be presented for registration either by the testator in which case the procedure laid down in S. 35 of the Act applies, or by any person claiming under the Will, in which case the procedure laid down in Ss. 40 and 41 applies. 20 M. 254. **Y**
- (d) The deposit of a Will under Part. IX of the Registration Act does not amount to the registration required by S. 13 of the Oudh Estates Act. 10 C. 976. **Z**

(46) Stamp duty on Wills.

Although there is no special provision in the Stamp Act II of 1899 exempting Wills from Stamp duty as in the earlier Act X of 1862, Wills are not chargeable with stamp duty. See Sch. I, Art. 33 of Act II of 1899. **A**

4.—“Codicil.”

(1) Definition same as in the Succession Act.

The definition of “Codicil” in this Act is the same as that given in S. 3 of the Indian Succession Act X of 1865. **B**

(2) “Codicil,” definition of—General Clauses Act.

Codicil is included in the term will. See S. 3 (57), Act X of 1897 (General Clauses). **C**

(3) Codicil is part of the will.

- (a) A codicil is part of the will and together with it makes one testament. *Per Lord Hardwicke in Fuller v. Hooper*, 2 Ves. Sen. 242. **D**
- (b) For the purpose of construction, a codicil is to be considered as part of the will. See S. 69, Act X of 1865. **E**

(4) Revocation of will, whether implied revocation of codicil—English Law before Wills Act.

A codicil, being *prima facie* dependent on the will, it was *held* before the passing of the Wills Act, that a codicil was impliedly revoked by the revocation of the will. But even then it could be established that it was the intention of the testator to retain the codicil notwithstanding his revocation of the will. *Coppin v. Dillon*, 4 Hagg. 361 and *Grimwood v. Cozens*, 2 Sw. and Tr. 364; cited in Will. on Exors, 10th Ed., Vol. I, p. 113. **F**

(5) Revocation of will, whether implied revocation of codicil—English Law after Wills Act.

- (a) A codicil will not be impliedly revoked merely by the revocation of the will, but the codicil remains effectual unless, it appears that, in revoking the will, the testator thereby intended to revoke the codicil as well. 1 Willm. Exors., 10th Ed., p. 115. **G**

4.—“*Codicil*”—(Concluded).

(b) The destruction or cancellation of a Will, whereby it is revoked, will not as a general rule, revoke a codicil. *Black v. Jobling*, 1 P. and D. 685. *In bonis Savage*, 2 P. and D. 78; *Gardiner v. Courthope*, 12 P.D. 14; *In bonis Clements* (1892) P. 254. H

(c) The question whether the testator meant to revoke the codicil by revoking the will depends upon the intention to be gathered from the circumstances of the case; and it is open for the Court to hold that the testator, by cutting off his signature to the will, intended to revoke the codicil as well which was on the same sheet of paper as the will. *In bonis Bleckly*, 8 P.D. 169; cited in *Theob. Wills*, 6th Ed., p. 49; also see *Will, on Exors.*, 10th Ed., Vol. I, p. 114. I

(6) *Codicil, whether entitled to probate by itself.*

Where a codicil is properly attested and executed, it is entitled to probate by itself, although it may be dependent by its language on an unattested will. *Gardiner v. Courthope*, 12 P.D. 14; cited in *Theob. Wills*, 6th Ed., p. 77. J

(7) *Incorporation of documents—Documents not in existence at date of will but existing at date of codicil—Effect.*

A document which is sufficiently referred to in the will, may be incorporated with the will, although it was not in existence at the date of the will, but existed at the date of the codicil to that will. *In bonis Hunt*, 2 Rob. 622 and *in bonis Lady Truro*, 1 P. and D., 221; cited in *Theob. Wills*, 6th Ed., p. 67; see S 51 and notes, *infra*. K

(8) *Incorporated documents not necessarily included in the probate.*

Although in theory the incorporated document should always be included in the probate, the Court does not insist upon it in practice as in the following cases:—(See I Will. Exors., 10th Edn., 75 (n)). L

- (i) Where the paper referred to is in the hands of another party who will not part with it, and the Court has no power to order its production. *In bonis Batterbee*, 2 Rob. 439; *In bonis Sibtherp*, 1 P. and D. 106. M
- (ii) Where the document is bulky. *In the goods of Lansdowne*, 3 Sw. and Tr. 194; *In bonis Dundas*, 39 L.J.P. and M. 165. N
- (iii) Where part only is material, in which case, the rest will be omitted. *In bonis Limerick*, 2 Rob. 813. O

5.—“*Specific legacy*.”(1) *Definition taken from the Succession Act.*

The definition of “*Specific legacy*” is taken from S. 129 of the Indian Succession Act, X of 1865. P

(2) *Specific legacy, defined.*

(a) A legacy is “*specific*” when it is a bequest of a *specified* part of the testator’s personal estate which is so distinguished. I Will. Exors., 10th Ed., 911. Q

(b) A *specific legacy* is in the first place, a part of the testator’s property; in the next place, it must be a part emphatically, as distinguished from the whole; it must be a severed or distinguished part; it must not be the whole in the meaning of being the totality of the testator’s property, or the totality of the general residue of his property after having given legacies out of it. *Per Jessel, M.R. in Bothamley v. Sherson*, 20 Eq. 304 at 308, 309. R

5.—“*Specific legacy*”—(Continued).

- (c) A *specific legacy* is something which a testator, identifying it by a sufficient description, and manifesting an intention that it should be enjoyed in the state and condition indicated by that description, separates in favour of a particular legatee from the general mass of his personal estate. *Per Lord Selborne, L.C. in Robertson v. Broadbent*, 8 Ap. Cas. 812. **S**

(3) *General legacy, defined.*

- (a) A *general legacy* is a legacy not of any particular thing, but of something which is to be provided out of the testator's general estate. *Theob.* 6th Ed., 147. **T**
- (b) A legacy is “*general*” when it is so given as not to amount to a bequest of a particular thing or money of the testator, distinguished from all others of the same kind. *I Will. Exors.*, 10th Ed., 911. **U**

(4) *Distinction between general and specific legacies.*

- (a) In the first place, on a deficiency of assets a *specific legacy*, will not abate with the general legacies. **Y**
- (b) Secondly, if a *specific legacy* fails by the the ademption or inadequacy of its subject, the legatee will not be entitled to any recompense or satisfaction out of the general personal estate, as in the case of general legacies. **W**
- (c) Thirdly, on a *specific bequest* of a thing described as already in existence, if no such thing ever existed, the legacy fails; while, on a general bequest of a thing, though not in the possession of the testator, the executor is bound to procure such a thing for the legatee, provided the state of the assets allow him. *I Will. Exors.*, 10th Ed., 912. **X**

(5) *Legacy may be specific though expressly provided otherwise.*

A legacy may be *specific*, though the testator expressly provides that it “shall not be deemed *specific*, so as to be capable of ademption.” *Jacques v. Chambers*, 2 Coll. 435. **Y**

(6) *Tendency of Courts is against construing legacies to be specific.*

The Courts in England are in general averse to construing legacies to be *specific*; and the intention of the testator with reference to the thing bequeathed, must be clear. *I Will. Exors.*, 10th Ed., 913. **Z**

(7) *Specific legacy of debt.*

- (a) A debt due to the testator may be specifically bequeathed, *e.g.*, a bequest of the money now owing to me from A. *Ellis v. Walker*, Amb. 309. **A**
- (b) A debt forgiven by the testator is a *specific legacy*. See *Wedmore v. Wedmore*, 1907, 2 Ch. 277. **B**

(8) *Specific legacy of land.*

- (a) Every devise of land is *specific* whether by specific description or residuary devise; and so also every devise of realty in English law. *I Will. Exors.* 10th Ed., 922; *Hensman v. Fryer*, 3 Ch. 420; *Lancefield v. Iggulden*, 10 Ch. 136. **C**
- (b) Thus a bequest of a rent out of a term of years is *specific*. *Tong v. Short*, 1 P. Wms. 403. **D**

5.—“*Specific legacy*”—(Continued).

- (c) But if the testator's meaning is to give the legatee *an annuity at all events*, the legacy is general, though directed to be paid out of an estate or the rents of it. *Mann v. Copland*, 2 Madd. 223; *Vickers v. Pound*, 6 H.L.C. 885, cited in *Ibid.* E
- (d) Although general legacies do not become specific because they are charged upon, or payable out of the proceeds of real estate yet if the testator direct his freehold or leasehold estates to be sold, and dispose of the proceeds in such a form as to evince an intention to bequeath them specifically, the legacy will be specific. *Page v. Leapingwell*, 18 Ves. 463, cited in 1 Will. Exors., 10th Ed., 923. F
- (9) **Legacy with mere charge on land is not specific.**
A gift of a legacy or an annuity with a mere charge on land is not specific. *Willow v. Rhodes*, 2 Russ. 452. G
- (10) **Gift of sum to be paid out of land is not specific.**
A gift of an annual sum or of a legacy to be paid out of real estate, is not specific. *Mann v. Copland*, 2 Madd. 223. H
- (11) **Bequest of personal estate, when general and when specific.**
(a) A bequest of a man's general personal estate is general. 1 Will. Exors., 10th Ed., 924. I
(b) But if a man having personal property at A, and elsewhere, bequeath all his personal estate at A to a particular person, the legacy is specific. (*Ibid.*) See *Powell v. Riley*, 12 Eq. 175; *Roffey v. Early*, 42 L.J. Ch. 472. J
(c) Thus a bequest of the residue of “all my personal estate in the Island of Jamaica” was held to be specific. *Nisbett v. Murray*, 5 Ves. 150. K
- (12) **Legacies of money, when general and when specific.**
(a) As a general rule, pecuniary legacies or legacies of money are general legacies. 1 Will. Exors., 10th Ed., 914. L
(b) Thus a legacy of £ 400 to be paid to A “in cash” is general. *Richards v. Richards*, 9 Price 226. M
(c) So also a legacy of money, to procure a specified object for the legatee, e.g., to buy a ring, or lands or government securities is general. *Apreece v. Apreece*, 1 Ves. & Beam. 364; *Hinton v. Pinke*, 1 P.W. 539; *Lawson v. Stitch*, 1 Atk. 507. N
(d) So also a direction to invest so much money as will produce a certain amount of stock is a general legacy. *Edwards v. Hall*, 11 Hare 23. O
(e) But a pecuniary legacy may be specific; e.g., of a sum of money in a certain bag or chest, or in the hands of A. *Lawson v. Stitch*, 1 Atk. 503; *Crockett v. Crockett*, 2 P.W. 164. P
- (13) **Gift of a particular thing may be a general legacy.**
A gift of a particular thing—e.g., of shares of a particular description—if there is nothing on the face of the will to show that the testator is referring to shares belonging to him is a general legacy, though he may in fact possess the shares in question. *Theob.*, 6th Ed., 147. Q

5.—“*Specific legacy*”—(Continued).(14) Gift of “rest of my stock” makes previous gifts of stock *specific*.

Where a testator, having given legacies of stock generally, gives the rest of the stock “standing in my name,” the earlier legacies must be *specific*.
Sleech v. Thorington, 2 Ves. Sen. 560. R

(15) Direction to purchase if testator should not have sufficient stock to answer legacies of stock previously given.

A—, shows that the testator meant to give something in existence at the time. *Townsend v. Martin*, 7 Ha. 471. S

(16) *Specific gift of stock where testator has smaller amount.*

A—, passes the smaller amount. *Ashton v. Ashton*, 3 P.W. 384. T

(17) There can be a specific bequest of stock to be purchased hereafter.

There can be a specific bequest of stock, of which a testator is not possessed at date of will, but of which he may be possessed at his death. *Fontaine v. Tyler*, 9 Price 94; *Queen's Coll v. Sulton*, 12 Sim. 521; *Stephen v. Dowson*, 3 Beav. 342, cited in 1 Will. Exors., 10th Ed., 919. U

(18) *Specific bequest of thing not in existence—Effect.*

On a specific bequest of a thing described as already in existence, where no such thing did ever exist among the testator's effects, the legacy fails. *Hend. 3rd Ed.*, 214. Y

(19) Secret trust of *specific part of residue* creates a specific legacy.

If a residuary legatee has by arrangement with the testator outside the will, accepted a trust as to a specific part of the residue, that part is in effect a specific legacy. *Llewellyn v. Washington*, 1902, 2 Ch. 220. W

(20) Gift of property not described specifically, but giving legatee a power of selection.

(a) Where a gift comprises a definite portion of a larger quantity, it is not rendered nugatory by the omission of the testator to point out the specific part which is to form such portion, the legatee being in such case entitled to select. 1 Jarm. 5th Ed., 331. X

(b) Thus, where a testator having three houses in Kings' street, bequeathed two of them, without mentioning which two, it was held, the devisee was entitled to select. *Tapley v. Eagleton*, 12 Ch. D. 683. Y

(c) Again, where a testator owning one and three quarters of a kani of land devised one kani thereof to plaintiff, held, plaintiff was entitled to select one kani out of the land in question. 18 M. 460, *folly. Hobson v. Blackburn*, 1 M. & K. 571; *Jacques v. Chambers*, 2 Coll. 435, 441; *Tapley v. Eagleton*, 12 Ch. D. 683. Z

(21) What passes with *specific legacies*.

(a) Specific legacies, are considered as separated from the general estate, and appropriated at the time of the testator's death; consequently, from that period, whatever produce accrues upon them, belongs to the legatee. 11 Will. Exors., 10th Ed., 1162, citing *Sleech v. Thorington*, 2 Ves. Sen. 563. A

(b) See, also, S. 128, *infra*. B

5.—“*Specific legacy*” —(Concluded).(22) *Legacy not specific merely from description of the investment.*

Where a certain sum is bequeathed, the legacy is not specific merely because the stock, funds or securities in which it is invested are described in the will. S. 130, Succession Act X of 1865. G

(23) *Legacy not specific merely from possession of similar stock.*

Where a bequest is made in general terms, of a certain amount of any kind of stock, the legacy is not specific merely because the testator was, at the date of his will, possessed of stock of the specified kind, to an equal or greater amount than the amount bequeathed. S. 131, Succession Act, X of 1865. D

(24) *Money legacy not specific merely from direction for deferred payment.*

A money legacy is not specific merely because the will directs its payment to be postponed until some part of the property of the testator shall have been reduced to a certain form, or remitted to a certain place. S. 132, Succession Act, X of 1865. E

(25) *Legacy is not specific merely because it is given to one for life with remainder to another.*

An indication in the will of an intention that the property should continue to be enjoyed by the tenant for life in *specie* as it existed at the date of the will, does not make a legacy specific. *Pickering v. Pickering*, 4 M. & Cr. 239. F

(26) *Enumeration of particulars does not make residuary clause specific.*

A general residuary clause is not the less general because it contains an enumeration of some of the particulars of which it may consist. *Taylor v. Taylor*, 6 Sim. 246; *Pickup v. Atkinson*, 4 Hare 628; *Sutherland v. Cooke*, 1 Coll. 502. G

(27) *A gift of residue is not specific because of a gift of a specific legacy therefrom.*

Nor does the fact that a specific legacy is given or a specific part of the personality excepted out of a general residue, make a gift of that general residue specific. *Re Ovey*, 20 Ch. D. 676. H

(28) *When a gift of residue will be specific.*

A gift of the residue of a fund will be specific only if it appears that the testator is dealing with a fund which he conceives to be of a certain amount. *Falkner v. Butler*, Amb. 514; *Petre v. Petre*, 14 Beav. 197; *Vivian v. Mortlock*, 21 Beav. 252. I

(29) *Specific legacy does not abate with general, on deficiency of assets.*

If there be a deficiency of assets to pay legacies, a specific legacy is not liable to abate with the general legacies. S. 136, Succession Act, X of 1865. J

6.—“*Demonstrative legacy.*”(1) *Definition taken from the Succession Act.*

The definition of “*Demonstrative legacy*” is taken from S. 137 of the Indian Succession Act, X of 1865. K

6.—“*Demonstrative legacy*”—(Concluded).(2) *Demonstrative legacy*, defined by Williams.

A ‘*demonstrative*’ legacy is a legacy of quantity in the nature of specific legacy, as of so much money, with reference to a particular fund for payment. I Will. Exors., 10th Ed., 913. L

(3) *Demonstrative legacy* distinguished from *specific* and *general* legacies.

(a) A *demonstrative* legacy is so far *general*, and differs so much in effect from one properly *specific*, that, if the fund be called in or fail, the legatee will not be deprived of his legacy, but be permitted to receive out of the general assets; and yet it is so far *specific*, that it will not be liable to abate with general legacies upon a deficiency of assets and that against all other general legacies, it will have a precedence of payment out of particular fund. I Will. Exors., 10th Ed., 913, 922. M

(b) A *demonstrative* legacy is also distinguished by the fact that, unlike *specific* legacy, where the subject-matter produces income, it does not carry that income or interest from the testator’s death. *Mullins v. Smith*, 1 Dr. and Sm. 204 (210). See S. 128, *infra*. N

(4) Legacy of money out of stock is *demonstrative*.

A legacy of money out of a particular stock, of which the testator was possessed at date of will, without anything expressive of testator’s intention is a *demonstrative* and not a *specific* legacy. *Hirby v. Potter*, 4 Ves. 748. O

(5) When it will be *specific*.

But where a clear intention appears, upon other parts of the will, that the testator intended to bequeath so much of the *identical* stock which he had, the legacy will be *specific*. I Will. Exors., 10th Ed., 919, citing *Drinkwater v. Falconer*, 2 Ves. Sen. 623. P

N.B.—But there is a distinction between a bequest of money out of stock, and a bequest of stock out of stock. *Hosking v. Nicholls*, 1 Y. and Coll. C.C. 478.

(6) Legacy of money out of a debt is *demonstrative*.

A legacy bequeathed out of a debt is *demonstrative* and not *specific*. I Will. Exors., 10th Ed., 921. Q

(7) Legacy of money out of the income of *Jagirs* is *demonstrative*.

Where the hereditary *jagirs* of a testator were bequeathed to his surviving son, with a direction that out of the income of the said *jagirs*, his predeceased son’s adopted son should receive a certain sum every year from the legatee, held that the annuity was a “*demonstrative legacy*.” 109 P.R. 1908=16 P.L.R. 1909=168 P.W.R. 1908. R

(8) Scope of the word *Labham* (profits).

As to—, see 29 M. 155. S

(9) Order of payment as between *specific* and *demonstrative* legacies.

Where a portion of a fund is specifically bequeathed and a legacy is directed to be paid out of the same fund, the portion specifically bequeathed shall first be paid to the legatee, and the *demonstrative* legacy shall be paid out of the residue of the fund, and, so far as the residue shall be deficient, out of the general assets of the testator. S. 138, Succession Act, X of 1865. T

7.—“Probate.”

(1) Definition same as in the Succession Act.

The definition of “Probate” in this Act is the same as that given in S. 3 of the Indian Succession Act, X of 1865.

U

(2) Probate, what is.

Copy of the will and copy of the grant of administration, together form the probate. 32 C. 710 at p. 713.

Y

(3) Executor's title.

An executor derives his title from the will and not the probate, but the probate is the only proper evidence of the executor's appointment. Encyclopædia of the Laws of England, II Ed., p. 555.

W

(4) Probate, scope and effect.

(a) Probate of a will of personalty, even in common form, is, while unrevoked, conclusive as to the appointment of an executor, and the validity and contents of the will, and its due execution according to the law of the testator's domicile. *Bradford v. Young*, 1885, 29 Ch. D. 617; *Concha v. Concha*, 1886, 11 Ap. Cas. 541.

X

(b) The grant of probate to the executor does not confer upon him any title to property which the testatrix had no right to dispose of. It only perfects the representative title of the executor to the property which did belong to the testator, and over which he had a disposing power. 4 C. 1 (5).

Y

(c) The probate is only conclusive as to the appointment of executors and the validity and contents of the will. On an application for probate, it is not the province of the Court to go into the question of title, with reference to the property which the will purports to dispose of, or the validity of such disposition. 12 B. 164; *folly*. 4 C. 1; See, also, notes under S. 12, *infra*.

Z

(d) On an application for probate of a will, which is opposed, the Court has jurisdiction to inquire not only whether the document propounded had been executed by the testator, but also whether he was in a state of mind competent to exercise his testamentary power, and whether it was his own voluntary act. The effect of the will, if proved, how far it was valid, and what property it might or might not affect, are not properly before the Court. 55 P.R. 1894.

A

8.—“Executor.”

(1) Definition same as in the Succession Act.

The definition of “Executor” in this Act is the same as that given in S. 3 of the Indian Succession Act, X of 1865.

B

(2) Executor can only be appointed by will.

(a) An executor can derive his office from a testamentary appointment only. See I Will. Exors., 10th Ed., p. 165, See *Re Pawley and the National Provincial Bank*, 1900, 1 Ch. 58.

C

(b) A will is the only bed where an executor can be begotten or conceived. According to the old doctrine, an executor could not be primarily appointed in a codicil. Office of Executor, 14th Ed., p. 3 cited in I Will. Exors., 10th Ed., 165 (Notes).

D

8.—“*Executor*”—(Continued).(3) **Executor, may be appointed by implication.**

- (a) An executor may be appointed by necessary implication. See *I Will. Exors.* 10th Ed., p. 168. **E**
- (b) If not expressly appointed, a person may be executor by implication, “according to the tenor,” as where a person is to have the testator’s goods to pay debts, or where there is a simple direction to pay debts. *In the goods of Cook*, 1902, p. 115; *In the goods of Kirby*, 1902, p. 188. **F**
- (c) Although no executor be expressly nominated in the will as executor, yet, if by any word or circumlocution, the testator recommend, or commit to one or more the charge and office, or the rights which appertain to an executor, it amounts to as much as the ordaining or constituting, him or them to be executors. *In the goods of Manly*, 3 Sw. and Tr. 56, cited in *I Will. Exors.*, 10th Ed., p. 165. **G**
- (d) Where a testator said on his death-bed to his wife that she “should pay all and take all,” held that that was enough to constitute her an executrix. *Brightman v. Keighley*, Cro. Eliz. 43, cited in *I Will. Exors.*, 10th Ed., p. 165 (Notes). **H**
- (e) So also where a testator says “I will that A.B. shall dispose of my goods which are in his custody,” A.B. is thereby made executor of those parcels or goods. *Pemberton v. Cony*, Cro. Eliz. 164; cited in *I Will. on Exors.*, 10th Ed., p. 165. **I**
- (f) Where a testatrix appointed two persons “trustees” of her will, and expressed her wish that they should pay her funeral and other debts, it was held that they were thereby constituted executors “according to the tenor.” *In the goods of Wilkinson*, 1892, p. 227. **J**
- (g) Where a person is authorised “to receive and pay the debts of the testator and to get in all the personal estate,” he is deemed to be an executor under this Act. *In the goods of Baylis*, L.R. 1 P. and M. 21, cited in 5 C. 756 (758). **K**
- (h) See, also, notes under S. 7, *infra*. **L**

(4) **Executor and co-adjutor—Difference.**

A co-adjutor or overseer has no power to administer or intermeddle otherwise than to counsel, persuade, and advise. Executors have power to administer the estate. *I Will. Exors.*, 10th Ed., p. 169. **M**

(5) **Executor, different from a trustee.**

As to this, see notes under S. 4, *infra*. **N**

(6) **Difference between an Executor and an Administrator.**

As to this, see notes under S. 4, *infra*. **O**

(7) **Executor renouncing office—Will, whether entitled to administration.**

Although the executor renounces his office administration would be granted with the will annexed. *In the goods of Jordan*, L.R. 1 P. and D. 555, cited in *I Will. on Exors.*, 10th Ed., p. 301. See, also, *O'Dwyer v. Geare*, 1 Sw. and T. 465. **P**

8.—“*Executor*”—(Continued).

(8) Appointment of executor bad for uncertainty.

(a) An appointment of “A as my executor with any two of my sons,” was held bad, as to the sons, for uncertainty. *In the goods of Baylis*, 2 Sw. and Tr. 618 ; cited in 1 Will. Exors., 10th Ed., 174. Q

(b) Where a testator, having three sisters living when he made his will, appointed “one of my sisters” sole executrix, and two of the sisters died in his life-time, held, that the appointment was void from uncertainty. *In the goods of Blackwell*, 2 P.D. 72 ; cited in 1 Will. Exors., 10th Ed., p. 174 (Notes). R

(9) Appointment of executors, in a will revoked by codicil naming a “sole executor.”

Where the testator in his will appointed two persons his executors, and in a codicil named his wife “sole executrix of this my will,” held that the appointment of executors in the will was revoked. *In the goods of Lowe*, 3 Sw. & Tr. 478 ; cited in 1 Will. Exors., 10th Ed., p. 173. S

(10) Misdescription of executor may be corrected.

A misdescription of an executor may be corrected by striking out the wrong surname. *In the goods of Cooper* (1889), p. 193, cited in 1 Will. Exors., 10th Ed., p. 174 (Notes). T

(11) Executor of executor is not derivative executor of original testator.

Even under the Succession Act the executor of an executor is not a derivative executor of the original testator, although such testator died before the passing of this Act. 12 B.L.R. 423. U

(12) Executor need not shed his character as executor before he can appear as legatee.

In this country an executor is not obliged under the law, as in England, to shed his character of executor before he can appear in his new character of legatee. 13 W.R. 69 (71). Y

(13) Mere nomination of executor—Effect.

The mere nomination of an executor only entitles the will to probate. *O'Dwyer v. Greare*, 1 Sw. and Tr. 465. W

Executor de son tort.(1) Definition of executor *de son tort*.

S. 265 of the Succession Act defines an executor *de son tort* as a person who intermeddles with the estate of the deceased or does any other act which belongs to the office of the executor, while there is no rightful executor or administrator in existence. See S. 265, Act X of 1885. See, also, 1 Will. Exors., 10th Ed., 183. X

(2) No section in the Probate Act corresponding to Ss. 265 and 266 of the Succession Act defining an executor *de son tort* and his liability.

There are no sections in the Probate and Administration Act corresponding to Ss. 265 and 266 of the Succession Act which respectively define an executor *de son tort* and lay down his liability. Y

8.—“*Executor*”—(Continued).(3) Doctrine of executor *de son tort* is nevertheless applicable to Hindus.

- (i) Formerly it was doubted whether the doctrine of executor *de son tort* was applicable to Hindus. See 2 Ind. Jur. N.S. 234; Montrou 308; 1 Tay. & Bell. 290, cited in Hend. 3rd Ed., 328. **Z**
- (ii) No doubt the sections of the Indian Succession Act relating to executors *de son tort* are not applicable to Hindus;—but it may be difficult to avoid the application of the principle on which executorship *de son tort* is founded to Hindus in some cases. 17 C. 620 (630). **A**
- (iii) Though the Indian Succession Act does not apply to Hindus and the sections dealing with the principles of a person becoming liable as executor *de son tort* have not been incorporated in the Hindu Wills Act, the principles of English Law relating to an executor *de son tort* may be applied to Hindus inasmuch that those principles are not repugnant to either of these statutes. 10 C.W.N. 566. **B**
- (iv) It is a common feature of Hindu and English Law, that persons who take the property of a deceased person subject themselves to liability for his debts. 35 C. 276=12 C.W.N. 237=3 M.L.T. 147; 3 M. 359 (368). **C**
- (v) Any one who has placed himself in the position of executor or has become administrator *de son tort* can be sued in equity by a creditor as if he were the legal representative, and if necessary, might be sued jointly with the legal representative of the deceased. 15 B.L.R. 296 (300). **D**

(4) Illustrative cases in which the doctrine was applied to Hindus.

- (i) Where the son-in-law of a deceased debtor had, in collusion with the latter's widow, intermeddled with and possessed himself, of substantially, the whole property of the deceased, it was held that he was properly joined as a co-defendant in a suit by the creditor and that he was liable for the debt of the deceased to the extent of assets received by him. 3 M. 359. **E**
- (ii) Where A on the death of B pays off a debt to C by B which he had guaranteed, and later on in the same day, removes goods belonging to B's estate, A becomes liable as executor *de son tort*. 28 M. 351. **F**
- (iii) On the termination of the appointment of an administrator *pendente lite* in respect of the property of a Hindu, if he continues to hold and deal with the property in the same way as he did prior to such termination, he can be sued as a quasi executor *de son tort*. 35 C. 276=12 C.W.N. 237=3 M.L.T. 147, following 2 Ind. Jur. N.S. 234 & 3 M. 359. **G**
- (iv) Where it was found that the defendant took possession of some of the properties of a deceased debtor, held, he was liable as executor *de son tort*, and the onus lay on him to prove that he did not receive so much of the property of the deceased as would satisfy the debt. 6 M.L.T. 362. **H**
- (v) A person can only be an executor *de son tort* as long as he intermeddles with the estate and his liabilities last as long as he continues dealing with the estate. 11 Bom. L.R. 1187. **I**

8.—“*Executor*”—(Continued).

- (vi) An executor *de son tort* is a person who intermeddles with the estate of a deceased person. So, the widow of a deceased undivided Hindu co-parcener in possession of the joint family estate is not an executor *de son tort* in any sense in respect of the deceased's estate, and at his death his estate passes by survivorship to the other co-parceners. 20 M.L.J. 308. J

(5) What acts constitute an executor *de son tort*.

A very slight circumstance of intermeddling with the goods of the deceased will make a person executor *de son tort*. The following have been held sufficient :—

- (i) Using or giving away or selling of the goods of the deceased. *Read's case*, 5 Co. 33 b; *Padget v. Priest*, 2 Term. Rep. 97; cited in 1 Will. Exors., 10th Ed., 183. K
- (ii) Taking the goods to satisfy one's own debt or legacy. *Godolph*, cited in *Ibid.* L
- (iii) Demanding the debts of the deceased or receiving them. (*Ibid.*) M
- (iv) Collecting the assets, knowing that they belong to the testator's estate, under the directions of a person known to be not the legal representative. *Sharland v. Mildon*, 5 Hare, 468. N
- (v) Suing or pleading as executor in suit. *Godolph*, cited in 1 Will. Exors., 185. O

(6) What acts do not make a man executor *de son tort*.

Generally, all acts of kindness and charity do not make the actor liable as executor *de son tort*; the following have been held to be such acts :—

- (i) Locking up the goods for preservation. *Godolph*, cited in 1 Will. Exors., 10th Ed., 18. P
- (ii) Directing the funeral and defraying the funeral expenses out of the assets, *Ibid.*; see, also, *Harrison v. Rowley*, 4 Ves. 216. Q
- (iii) Making an inventory of the assets. (*Ibid.*) R
- (iv) Repairing houses or providing necessaries for children. (*Ibid.*) S

(7) Person setting up adverse title is not an executor *de son tort*.

A person setting up an adverse title to the goods of the deceased is not liable as an executor *de son tort*. *Flemings v. Jarrat*, 1 Esp. N.P.C. 386, cited in 1 Will. Exors., 10th Ed., 189. T

(8) Agent of executors before proving will is not an executor *de son tort*.

A person who deals with the goods of the testator as agent of executors who afterwards prove the will, cannot be treated as executor *de son tort*. *Sykes v. Sykes*, 5 C.P. 113. U

(9) Person receiving goods from an executor *de son tort* when himself executor *de son tort*.

- (a) Ordinarily, a person is not liable as an executor *de son tort* unless his hand has been the first to take the goods of the deceased. He is not an executor *de son tort* if he has received the goods from an executor or an executor *de son tort*. *Paull v. Simpson*, 9 Q.B. 375, cited in 3 M. 359 (363). Y

8.—“*Executor*”—(Continued).

- (b) But, if a person colludes with an executor or executor *de son tort* so that he may obtain the property of a deceased person without consideration, and defeat or hinder creditors, he thereby becomes responsible as an executor *de son tort*. (Ibid.) W

(10) Purchaser of some of the assets is not an executor *de son tort*.

The purchaser of a portion of the assets of a deceased person is not an executor *de son tort*, and he should not be joined as a party in a suit, against the legal representatives, on a promissory note executed by the deceased. 6 M.L.J. 186 (187). X

(11) Whether there can be an executor *de son tort* while there is another rightful executor—English and Indian Law.

- (a) It is doubtful whether a person intermeddling with the goods where there is another rightful personal representative, makes himself liable as executor *de son tort*. See I Will. Exors., 10th Ed., 186, 187. Y

- (b) The rule of English Law that where there is a personal representative, a liability as executor *de son tort* cannot arise, does not apply in India. 28 M. 351 (353). Z

(12) Definition of “Legal representative” in C.P.C., 1908 includes an executor *de son tort*.

“Legal representative” is defined by the C.P.C., 1908 to mean a person who in law represents the estate of a deceased person, and to include any person who intermeddles with the estate of the deceased, and where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued. A

(13) How far a person taking possession of the estate of a deceased Hindu is his representative.

- (a) Until some claimant comes forward, the party who takes possession of the estate of a deceased Hindu must be treated for some purposes as his representative. *Per Markby, J.*, in 3 C.L.R. 154 (156); 14 M. 454. B

- (b) A person, who, without any title at all, takes possession of the estate of a deceased Hindu, is treated for some purposes as his representative. 4 C. 342=2 C.L.R. 223; 24 W.R. 109; 30 C. 1044; 14 M. 454; 8 C.W. N. 843 (857); 3 C.L.R. 157. C

(14) Liability of an executor *de son tort* under the Succession Act.

When a person has so acted as to become an executor of his own wrong, he is answerable to the rightful executor or administrator, or to any creditor or legatee of the deceased, to the extent of the assets which may have come to his hands after deducting payments made to the rightful executor or administrator, and payments made in a due course of administration. See S. 266 of the Succession Act, X of 1865. D

(15) Liability of executor *de son tort* generally.

An executor *de son tort* has all the liabilities, but none of the privileges of a rightful executor. *Per Lord Cottenham in Carmichael v. Carmichael*, 2 Phil. C. C. 103. E

(16) Liability of executor *de son tort* to suit.

- (a) Where there is an executor *de son tort*, a creditor may sue for his debt and is not limited to an administration suit. 28 M. 351 (354). F

8.—“*Executor*”—(Continued).

- (b) An executor *de son tort*, can be sued in respect of property of the deceased of which he has taken possession. 8 C. W. N. 843 (851); 2 Ind. Jur. N. S. 234; 3 C. L. R. 154 (156); 14 M. 454 (457); 4 C. 342; 24 W. R. 109; 30 C. 1044. But see 17 M. 486; 4 C. W. N. 405; 21 B. 424. G

(17) *Liability of executor de son tort*—Extent.

- (a) The Succession Act limits the liability of an executor *de son tort* to the amount of the assets received, and this limitation has been accepted by the Courts in other cases not governed by the Succession Act 3 M. 359 (863). H
- (b) The liability of an executor *de son tort* extends to the amount of the assets received, but where he has mingled this with his own so as to make it impossible to distinguish the one from the other, the Court, may, for lack of evidence, treat the whole as available to make restitution. 3 M. 359. I
- (c) An executor *de son tort* is liable to account for such assets as he has received, but is not liable to a general account, unless he has received everything. *Coote v. Whittington*, 16 Eq. 534. J

(18) *Onus of proof of amount of assets received is on executor de son tort.*

- If a person suing the executor *de son tort* has shown that some property has passed into his hands, the latter is bound to show that he has not received enough to satisfy the debt, as the extent to which such property has been received is a matter peculiarly within his knowledge. 3 M. 359. K

(19) *Executor de son tort, how far protected.*

- (a) Though an executor *de son tort*, cannot by his own wrongful act acquire any benefit, yet, he is protected in all acts not for his own benefit, which a rightful executor may do. 1 Will. Exors., 10th Ed., 191. L
- (b) In an action by the rightful executor or administrator, an executor *de son tort* can give evidence of payments made by him in due course of administration in mitigation. *Padget v. Priest*, 2 T.R. 100; *Mountford v. Gibson*, 4 East 454; *Fyson v. Chambers*, 9 M. & W. 468; cited in 1 Will. Exors., 10th Ed., 194. M

(20) *What payments by the executor de son tort are binding on the true representative.*

- (a) It is not every payment by the executor *de son tort* from the assets of the deceased that is valid against the true representative. *Thompson v. Harding*, 2 E. and B. 630. N
- (b) For such a payment to be so binding, it must be proved (i) that the executor *de son tort* was really acting as executor, (ii) that the party dealing with him had fair reason to suppose that he had authority to act as such, and (iii) that the payment in question was lawful, being one which a true representative was bound to make in the due course of administration. (*Ibid.*); see, also, *Buckley v. Barber*, 6 Exch. 164. O

(21) *How an executor de son tort can discharge himself.*

- An executor *de son tort* can discharge himself by accounting to the rightful executor before suit, although one executor cannot discharge himself by accounting to a co-executor. *Hill v. Curtis*, 1 Eq. 90—98. P

8.—“*Executor*”—(Concluded).(22) Right of retainer of executor *de son tort*.

(a) An executor *de son tort* cannot retain for his own debt, though the debt is of a superior decree and though the rightful executor or administrator assent to such retainer. Coulter's case, 5 Co. 30 (a); *Curtis v. Vernon*, 3 T.R. 587. Q

(b) But, he can retain, if he afterwards obtain administration. *Pyne v. Wolland*, 2 Ventr. 180; *Williamson v. Norwich*, Sty. 397; cited in 1 Will. Exors., 10th Ed., 193. R

(c) An executor *de son tort* cannot plead *plene administravit* if he retains the assets for his own use or pays his own debt. 28 M. 351 (354). S

(23) Consent of heir to appropriation, no defence to an executor *de son tort*.

Consent by the heir to the appropriation by an executor *de son tort* is not a defence to a creditor's action. 28 M. 351. T

(24) An executor *de son tort* cannot enforce his claim against the estate without taking administration.

Although a creditor may sue an executor *de son tort* for the recovery of his claim, one executor *de son tort* cannot sue another such person or enforce his claim against the estate, without taking out administration. 18 B. 337. U

9.—“*Administrator*.”

(1) Definition same as in the Succession Act.

The definition of “Administrator” in this Act is the same as that given in S. 3 of the Indian Succession Act, X of 1865. Y

(2) After the grant of letters powers of administrator and executor are the same.

After the grant of the letters the office and powers of an administrator are the same as those as of an executor. *Blackborough v. Davis*, 1 P. Wms. 43, cited in Hend., p. 4. W

(3) There is no such term as “administrator *de son tort*.”

The term “executor *de son tort*” being used indifferently to denote those who intrude themselves into the affairs, whether of testates or intestates, the law knows no such appellation as an “administrator *de son tort*.” See Godolph. pt. 2, c. 8, S. 2. X

10.—“*District Judge*.”

(1) Definition same as in the Succession Act.

The definition of “District Judge” in this Act is the same as that given in S. 3 of the Indian Succession Act, X of 1865. Y

(2) “District Judge” defined—General Clauses Act.

“District Judge” shall mean the Judge of a principal Civil Court of original jurisdiction, but shall not include a High Court in the exercise of its ordinary original civil jurisdiction. S. 3 (15) of Act X of 1897 (General Clauses). Z

(3) “District Judge” whether included “Recorder of Rangoon.”

As to this, see 24 C. 30; 11 W.R. 413.

(4) In Assam, “District Judge” means the Judicial Commissioner.

As to this, see 12 W.R.C.R. 424. B

CHAPTER II.

OF GRANT OF PROBATE AND LETTERS OF ADMINISTRATION.

General.

Grants to the Administrator-General.

As to grants of probate and letters of administration to the Administrator-General, see the Administrator-General's Act, II of 1874. C

Character and property of executor or administrator as such.

4. The executor or administrator, as the case may be, of a deceased person, is his legal representative for all purposes, and all the property of the deceased person vests in him as such ¹. [S. 179].

But nothing herein contained shall vest in an executor or administrator any property of a deceased person which would otherwise have passed by survivorship to some other person ².

(Notes).

General.

(1) Corresponding Indian Law.

This section corresponds to S. 179 of the Indian Succession Act, X of 1865, but contains the 2nd para in addition, saving the rights of the members of a joint Hindu family. D

(2) Section has no retrospective operation.

Section 4 does not have a retrospective operation so as to vest in an executor of a Hindu will made prior to the Probate Act, the estate of a deceased Hindu who died prior to that Act, 25 C. 103 (106). E

1.—“All the property of the deceased person vests in him as such.”

(1) “Executor” and “Administrator,” definitions.

For definitions of “Executor” and “Administrator,” see S. 3, *supra*. F

(2) Difference between an Executor and an Administrator.

- (i) The interest of an executor in the estate of the deceased vests in him from the moment of the testator's death, that of an administrator only from the time of the grant. See S. 12, *infra*. G
- (ii) An executor may do many acts before he obtains probate; but an administrator may do almost nothing till letters of administration are granted to him. See notes under Ss. 12 & 15, *infra*. H
- (iii) An executor derives his powers from the will and not from the grant of probate; but an administrator owes his powers entirely to the appointment of the Court. Majumdar, 440. I
- (iv) An executor is not generally required to execute a bond for the due discharge of his duties; but an administrator is bound to execute such a bond. See S. 78, *infra*. (*Ibid.*) J
- (v) After the grant of letters of administration, the office and powers of an administrator are the same as those of an executor. *Blackborough v. Davis*, 1 P. Wms. 48. K

1.—“All the property of the deceased person vests in him as such”

—(Continued).

(3) Executor, different from a trustee.

The true position, powers and duties of an executor are essentially different from those of a trustee. 21 C. 195 (199). **L**

(4) Executor now represents both realty and personalty in England as in India.

In England, since the passing of the Land Transfer Act, 1897, both realty and personalty primarily vest in the legal personal representatives, and in cases of realty also, a testator's executors are his representatives as in India. See I Will. Exors., 10th Ed., 444. **M**

(5) “Vest” inappropriate in the case of Hindu executors before the Hindu Wills Act.

The word “vest” is not an appropriate one to describe the position of a Hindu executor in a will made prior to the Hindu Wills Act. *Per Markby, J.*, in 4 C. 455 (468). **N**

(6) Position of Hindu executor before the Hindu Wills Act—Inferior to an English executor—Only a manager, with no estate vested in him.

(i) The Hindu executor is not, in all respects, identical, in power or character with the heir, or with what the English executor (independently of Statute) may be and has been considered, *i.e.*, *qua* representative. *Montriou, cited in Majumdar*, 438. **O**

(ii) According to the Hindu law, an attorney or executor under a will has no greater power over immoveable estate than a manager who according to *Hoonmanpersaud's case* (6 M.I.A. 393) has only a limited and qualified power. *Per Peacock, C.J.*, in *Bourke's Reports*, Part VII, p. 50, *cited in* 2 B. 388 (407). **P**

(iii) Grant of probate of the will of a Hindu confers no title, upon the executor, but he derives his title from the will itself. Probate is evidence of his title, only so far as a decree of the Court granting it would be, namely, between the parties and those privy to the suit in which the decree is made. 1 B.L.R.O.C. 24. **Q**

(iv) Prior to this Act, in cases to which the Hindu Wills Act and the Indian Succession Act did not apply, probate could only be granted under the Supreme Court Charters; but the representative status conferred by such grants fell far short of that conferred by similar grants in the case of deceased European British subjects. In the case of wills of Hindus not governed by the Hindu Wills Act, probate conferred no right of property analogous to the estate or interest conferred upon an English executor. *Per Phear, J.*, in 2 B.L.R.O.C. 1. **R**

(v) Probate does not confer, upon the executor of a Hindu will, any personal rights of property analogous in any way to an English estate or interest. The will gives him just such powers of dealing with the property comprehended in it, as its words express, and no more. Beyond the scope of the will, and so far as he is not constructively restricted by its directions, it may be that he has the powers which are implied in the bare authority of a manager during minority; but these are all he can claim.....With regard to this rule, moveable property is in the same predicament as immoveable property. 2 B.L.R.O.C. 1 (4); *Per Phear, J.*, *citing Bourke*, Part VII, 8 & 6 M.I.A. 393. **S**

1.—“All the property of the deceased person vests in him as such”

—(Continued).

- (vi) A Hindu widow, who has obtained letters of administration from the High Court, of the estate of her intestate husband and who has left a minor son, is not entitled, in such character, to maintain a suit with respect to immoveable property left by him without bringing the son on the record as a party. 2 C. 431. T
- (vii) The Hindu executor takes no estate, but only a power of management. *Per Markby, J.*, in 3 C.L.R. 315 (328)=4 C. 455 (469). U
- (viii) The mere appointment of a person as executor to a Hindu does not cause any property to vest in him at all, and if, as executor, he is entitled to hold the property, he holds only as manager. *Per Markby, J.*, in 4 C. 455 (468). Y
- (ix) It is quite true that a Hindu executor was, at any rate, until the passing of the Hindu Wills Act, only a manager, but as such manager, he had certain powers over the estate, and for many purposes he represented the testator. 14 C. 875 (861). W
- (x) An executor under a Hindu will, before the Hindu Wills Act, was not in the same position as an English executor under an English will. The property did not vest in him. His position was analogous to that of the manager of an infant heir under the Hindu Law. 25 C. 103. X
- (xi) Executors and trustees of Hindu wills executed before 1870, when the Hindu Wills Act came into force, were merely managers and had no estate vested in them. 32 C. (861)=1 C.L.J. 270. Y
- (xii) Independently of the provisions of the Indian Succession Act and the Hindu Wills Act, the executors of a Hindu do not, in the character merely of executors, take any estate, properly so called, in the property of the deceased; or in other words, the mere nomination of executors, though followed by probate, does not, of itself, confer any estate on the executor further than the estate he may have by the express words of the will, or as heir of the testator. *Per Green, J.*, in 1 B. 269 (275). Z
- (xiii) Setting aside the Hindu Wills Act of 1870, the reason given by Lord Cottenham in *Mapp v. Elcock* (2 Phil. 793 at 796) for the title of an executor in England to personalty, viz., that it is derived not from any gift of the testator, but from the operation of law incident to the office, does not exist in the case of the executor of a Hindu. Although the testamentary power and the right to appoint an executor has been recognized in all three Presidencies as belonging to Hindus, that power and right have been regarded as subject to Hindu Law and usage. *Per Westropp, C.J.*, in 2 B. 388 (406). A
- (xiv) The Courts in this country have regarded an executor under the will of a Hindu as possessing a power inferior to that of an executor in England. *Per Westropp, C.J.*, in 2 B. 388 (407). B
- (xv) In the mofussil in India, the executors of the will of a Hindu do not, in the character merely of executors, take any estate in the property unless it is conferred on them by the terms of the will. 26 B. 301 (304), citing 1 B. 269. C

1.—“All the property of the deceased person vests in him as such”

—(Continued).

(xvi) Prior to the Hindu Wills Act of 1870, the powers and functions of the executor of a Hindu estate were not those of an English executor, but rather those of a manager; he did not require probate, and probate, if obtained, would not have vested him with any title to the estate, either real or personal, which he administered...The immediate effect of the Act of 1870 was to place a Hindu executor who was in a position, and chose, to take advantage of its provisions, on precisely the same footing as the executor of an Anglo-Indian testator, in so far as concerns the taking out of probate of the deceased. *Per Lord Watson*, in 22 C. 783=22 I.A. 157=5 M.L.J. 157 (163) (P.G.). D

(7) Hindu executor since the Hindu Wills Act, compared to an English executor and to a *Shebait* of an idol.

(a) Since the Hindu Wills Act, a Hindu executor is on the same footing as an English executor, with this difference, that, he cannot transmit his powers to his own executor. See 12 B. L. R. 423. E

(b) The position of an executor or administrator, as the case may be, of a deceased person, as such person's legal representative, in whom all the property of the deceased vests as such by virtue of S. 179 of the Succession Act, may be said to be similar to that of the *Shebait* of an idol. *Per Chandavarkar, J.*, in 29 B. 96=6 Bom. L. R. 553. F

(8) Probate when necessary in cases of Hindu and Mahomedan Wills—Effect of Hindu Wills Act and the Probate Act.

(i) Previously to the passing of the Probate Act V of 1881, executors appointed by such wills as fell within the Hindu Wills Act, XXI of 1870 acquired the same estate and interest in the property of their deceased testator with the same restrictions in representing the estate in a Court of Justice as obtained under English Law. *Per Sargent, C. J.*, in 8 B. 241. G

(ii) All the sections of the Indian Succession Act, X of 1865 relating to grants of probate and letters of administration which were formerly incorporated in the Hindu Wills Act, XXI of 1870, are now, with the exception of S. 187, removed from that Act by S. 154 of Act V of 1881, but are, with the exception of S. 187, re-enacted *verbatim* in Act V of 1881. S. 187, however, remains incorporated by reference with the Hindu Wills Act. (*Ibid.*) H

(iii) The result is, that probate is necessary in a case of such Hindu wills as fall within the Hindu Wills Act. But, the omission from Act V of 1881 (which applies to all Mahomedans and Hindus) of any section corresponding to S. 187 of the Indian Succession Act shows that it was the intention of the Legislature that, except in cases falling within the Hindu Wills Act, an executor of any Hindu or Mahomedan will may establish his right in a Court of Justice without taking out probate. (*Ibid.*) I

(iv) Apart from cases falling within S. 187 of the Succession Act, in cases governed by Act XXVII of 1860, a debtor has still the right of insisting upon a plaintiff-executor taking out probate. 8 B. 241. J

1.—“All the property of the deceased person vests in him as such”

—(Continued).

- (v) There is no law at present in force in the Mofussil which obliges a person, claiming under a Will, to obtain probate of the will, or otherwise establish his right as executor, administrator or legatee, before he can sue in respect to any property which he claims under the will. In any suit or proceeding instituted by him, it is for the Court, in which the suit or proceeding is pending, to determine, for the purposes of such suit or proceeding, whether the will is genuine and valid, and confers upon the plaintiff or applicant the right claimed. 6 B. 73. K
- (vi) In cases not governed by the Indian Succession Act, probates and letters of administration granted by the High Court of Bombay in respect of Hindus, Mahomedans and other persons not usually designated as British subjects take effect only, and can only be granted for the purpose of recovering debts and securing debtors paying the same, except so far as is otherwise provided in Act XXVII of 1860. 6 B. 452. L
- (vii) An executor of the will of a deceased Mahomedan, since the 1st April, 1881, the date of the coming into force of the Probate and Administration Act V of 1881, cannot claim to represent the estate of his testator until he has taken out probate. 7 B. 266. M
- (viii) Probate may be granted of a nuncupative will of a Mahomedan. A Mahomedan's power of making an oral will has not been taken away by the Probate and Administration Act. 24 B. 8. N
- (ix) The Supreme Courts in India never applied the English rule as to the necessity for probate to Hindu or Mahomedan wills, nor did they attribute to such probates, when granted, the English doctrines as to the operation of probate. Under that system a Hindu or Mahomedan executor took no title to property merely as such by virtue of the probate. In the case of Mahomedan executors, such a title was created for the first time by the Probate Act V of 1881. 33 C. 116 (P.C.)=9 C.W.N. 938. O
- (x) Since, by Mahomedan Law, a testator has power only to dispose of one-third of his property, an executor of a Mahomedan will, who had obtained probate under Act V of 1881, is a bare trustee for the heirs as to two-thirds of the estate when realised, and an active trustee as to one-third for the purposes of the will, and of these trusts one is created by the act and the probate irrespective of the will, and the other by the will established by the probate. 33 C. 116 (P.C.)=9 C.W.N. 938. P
- (xi) The executor of a Mahomedan takes the whole estate of the testator by virtue of the Probate and Administration Act, and is a trustee for the entirety thereof. 13 C.W.N. 153, *follo.* 33 C. 116=9 C.W.N. 938. Q
- (9) Probate not necessary in the case of wills made before the Hindu Wills Act.

S. 187 of the Succession Act not being made applicable to wills of Hindus made before 1870, when the Hindu Wills Act came into force, it is not obligatory on executors or legatees under such wills to take out probate or letters of administration in order to establish their rights in a Court of Justice. 14 C. 37. R

1.—“All the property of the deceased person vests in him as such”

—(Concluded).

10) Does the vesting take place before probate in the case of Hindu Wills.

- (i) Their Lordships of the Privy Council seem to suggest that the estate does not vest in the executor until he has taken out probate. 22 C. 788 (796) = 22 I.A. at p. 115. S
- (ii) In Calcutta, it has been stated that an executor does not represent the deceased by virtue of the will until he has obtained probate. 4 C. 342 (345) = 3 C.L.R. at p. 156 ; 25 C. 103 (106). T
- (iii) In Bombay it has been held that the estate vests in the executor even before probate. 8 B. 241 (255); 10 B. 468 ; 12 B. 621; 31 B. 418 (428) = 9 Bom. L.R. 237 (293). U
- (vi) According to Messrs. Philip and Trevelyan, the powers of an executor are not dependent upon probate. Ph. and Trev. 353. Y

(11) Effect of vesting before probate.

The effect of the rule in the section is to enable the executor before probate to give a valid discharge to the testator's debtor paying him, and place him in the same position in that respect as an executor by English Law. *Per Sargeant, C. J.* in 8 B. 241 (255). W

2.—“But nothing....shall vest in an executor or administrator any propertywhich would otherwise have passed by survivorship to some other person.”

(1) Estate passing by survivorship does not vest in executor.

- (a) An estate which passes to another by survivorship on death cannot vest in the executor. 12 B. 621. X
- (b) In an undivided Hindu family, when a co-parcener dies, there are no effects or property of his, to which the surviving co-parceners can succeed as his heirs, but they take the whole of the family property by right of survivorship, and consequently it is not necessary for them to take out any letters of administration. 27 B. 140. Y

(2) But, there is a distinction between the legal and beneficial interest in such a case.

- (a) There is a distinction between a *legal title* to, and a beneficial interest in property ; so that, there might be cases where the latter interest passes by survivorship, but the former title does not. In such cases probate or letters of administration are necessary in support of the legal title. See 24 B. 350. Z
- (b) Thus, where certain shares of the Bank of Bombay stood in the name of S, and after his death his minor son applied to the Bank to have the shares transferred to him as the sole surviving co-parcener, it was held, that having regard to S. 23 of the Presidency Banks Act, XI of 1876, the legal title did not survive, though the beneficial interest did, and that probate or letters of administration were necessary for the transfer of the shares. 24 B. 350. A

2.—“*But nothing....shall vest in an executor or administrator any property....which would otherwise have passed by survivorship to some other person*”—(Concluded).

- (3) “Property of the deceased” does not include property held by the deceased as executor or administrator.

(a) “Property of the deceased” in the section means only the actual property of the deceased, whether held by him for his own benefit, or the benefit of others, and does not mean property vested in him as executor or administrator. 12 B.L.R. 423 (428). B

(b) Therefore, under the Indian Succession Act, or under the Probate Act, the executor of an executor is not derivative executor of the original testator, even though such testator died before 1866. 12 B.L.R. 423. C

- (4) Nor property in which the deceased had no beneficial interest.

An executor, as such, has no title to property which did not belong to the testator, or over which he had no disposing power. 4 C. 1=2 C.L.R. 422. D

- (5) Trust property does not vest in executor.

Property held by the testator in trust or as executor or administrator, does not vest in his executor. 12 B.L.R. 423. E

Miscellaneous.

- (1) Executor or administrator has no beneficial interest in the property vested in him.

(a) An executor, or an administrator with the will annexed, has not, as such, any beneficial interest in the property. 2 B. 388. F

(b) Under the section the executor is made the legal representative of the deceased person, and all the property of the deceased person vests in him as such representative. But in the capacity of representative of the deceased, the executor is bound to carry out the deceased's directions relative to the disposal of the property, so far as they validly extend, and whenever such directions are absent or are inoperative by reason of illegality, then to hand over the property to those entitled by law to succeed to it. It can never be, that, as representative of the deceased, the executor is entitled to exclude either those to whom the testator or those to whom the law directs that the property should go from the deceased. *Per Phear, J.*, in 8 B.L.R. 208 (221). G

- (2) Executor has no right to the undisposed of residue.

The rule of English Common Law, that the undisposed of residue of personal estate vests in the executor beneficially, does not apply to the will of a Hindu testator in India. 2 B. 388; 13 B. 61; 4 C. 1 (5). H

- (3) How far the executor is a trustee “for a specific purpose” within S. 10 of the Limitation Act.

(a) An executor who, by the will is made an express trustee for certain purposes, is, as to the undisposed of residue, a trustee within the scope of S. 2, Act XIV of 1859, for the heir or heirs of the testator. 2 B. 388. But see, *infra*. I

Miscellaneous—(Concluded).

(b) So far as the heir is concerned, the property is not "vested in trust for a specific purpose" in the executor within the meaning of the Limitation Act, IX of 1908, S. 10. See 21 B. 646; 14 B. 476; 4 C. 455 = 3 C.L.R. 315; 4 C. 897 (923) = 4 C.L.R. 193. J

(c) For a case in which from the terms of the will, the property was held to be vested in the executor in trust for a specific purpose. See 30 C. 369. K

(4) Duties of executor, how long they extend.

(a) The duties of the executor are to administer the estate of the deceased only so far and so long as to enable him to carry out the terms of the will of which he is executor. After the property has ceased to be the estate of the deceased and has become the property of the residuary legatee under the will, the executor, as such, has no authority to manage the estate on his behalf. 31 C. 89 (93). L

(b) But, although an estate had been administered, an executor still represents the estate for the purpose of receiving dividends on shares of a company registered in the name of the deceased testator, the company being concerned only with the legal title to the shares and not the claims made by the beneficiaries against the executor as trustee. 19 B. 1 (P.C.). M

(5) Remedy of purchaser of share of estate vested in administrator.

Where the property of a deceased person becomes vested in his administrator under the Act, it remains in him until he distributes the estate and the widow of the deceased has no saleable interest in any part of such estate until, in the course of the administration thereof, her share is determined and allotted to her. Till then, the only process by which a purchaser of the interest of such a widow in the estate can legally obtain such interest, is by a suit for the administration of the entire estate, and to such a suit, the widow, if alive, must be made a party. If she is not alive, letters of administration to her estate must first be taken out and the administrator must be made a party. 23 M. 216 = 9 M.L.J. 338. N

(6) Where there is a will, the heirs do not represent the estate.

Where a deceased person leaves a will, his heirs on intestacy do not represent his estate. 22 C. 903; 6 Ind. Cas. 627. See, also, notes under S. 12, *infra*. O & P

(7) Where whole estate is vested in executor, probate cannot be granted limited to part of the estate.

Wherever under the section the whole estate is vested in the executor, probate limited to part of the estate cannot be granted. 6 B. 460. Q

(8) Executors who have not proved may call for an inventory and account from those who have proved.

As to this, see notes under S. 9, *infra*. R & S

N.B.—See, also, notes under S. 82, *infra*.

5. When a will has been proved and deposited in a Court of competent jurisdiction situated beyond the limits of the Province, whether in the British dominions or in a foreign country, and a properly authenticated copy of the will is produced, letters of administration may be granted with a copy of such copy annexed. [S. 180.]

Administration
with copy annexed
of authenticated
copy of will proved
abroad 1.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 180 of the Indian Succession Act, X of 1865. T

1.—“Administration with copy annexed of authenticated copy of will proved abroad.”

- (1) What is a “properly authenticated copy of the will.”

Where the original will had been deposited and registered in Scotland, a copy of the will certified by a Notary Public to be a true copy, but which did not purport to be a copy made from the will itself and did not bear any certificate that it had been compared with the original, was held not to be a properly authenticated copy of the will. 14 Bur. L. R. 33. U

- (2) “Authenticated copy” is called “Exemplification.”

The properly authenticated copy of the will referred to in the section is technically called “exemplification.” See 8 B.L.R. Appx. 76. Y

- (3) Probate may be granted of an exemplification.

For a case in which the probate of an exemplification was granted, see 4 C.W. N. vii. W

- (4) Procedure where the will has not been proved in a foreign Court.

If a foreign will has been already proved and deposited in a foreign Court abroad, S. 5 of the Probate Act, following the English Law, enables a Court in British India to grant letters of Administration to the applicant with a properly authenticated copy of such will annexed, and thus to dispense with the necessity of proof of the original will; but, where a foreign will has not been so proved, the Judge must himself take evidence as to the due execution of the will, according to the law of the country in which the testator was domiciled, in cases where the property in respect of which the probate is sought is moveable property; while, if the property left by the testator in British India is immoveable, the rules applicable to the execution of wills in British India must be applied. 20 B. 607 (610). X

- (5) Probate or letters of administration of a foreign will is necessary for a suit in British India by its executors.

A suit in British India by the executors of the will of a native of Cutch was dismissed on its appearing that the plaintiffs were furnished only with probate issued from a native Court, of which they produced a copy certified by the Political Agent of Cutch, and the plaintiffs were directed to take out probate or letters of administration in British India under Act V of 1881, or a certificate under Act VII of 1887. 17 M. 14. Y

1.—“Administration with copy annexed of authenticated copy of will proved abroad”—(Continued).

- (6) **A foreign executor must obtain probate or administration before suing in England.**

(a) If the deceased left no property in England, his will need not be proved in England; but if, a foreign executor wishes to institute a suit in England, he must be constituted personal representative by a grant of probate or administration in England. *Jawncsey v. Sealey*, 1 Vern. 397; *Carler v. Crofts*, Godb. 33; *Whyte v. Rose*, 3 Q.B. 580; *Logan v. Firlie*, 2 Sim. & Stn. 284. **Z**

(b) For it is an established rule that to sue in England probate or letters of administration must be obtained in England except in certain cases. *I Will. Exors.*, 10th Ed., 271. **A**

- (7) **When a properly authenticated copy of a foreign will can be admitted to probate.**

When a will has been proved in the Consistorial Court of the Bishop of Lodor and Man, or in the Courts of Channel Islands, or in a Scotch Court, or in a foreign Court, an office copy or properly authenticated copy of it is received in the place of the original will and is admitted to probate without evidence as to law, provided the deceased was domiciled in the country where it was proved. *Hend.*, 3rd Ed., 249. **B**

- (8) **The English Court is guided by the grant of the foreign Court of domicile.**

(a) With respect to the validity of the will of a foreigner domiciled abroad, the English Court will be guided by the law of the place of domicile. *Curling v. Thornton*, 2 Add. 21. **C**

(b) “It is a general rule that when a person dies domiciled in a foreign country, and the Court of that country invests anybody, no matter whom, with the right to administer the estate, this Court ought to follow the grant, simply because it is the grant of a foreign Court, without investigating the grounds on which it was made, and without reference to the principles on which grants are made in this country.” *Per Lord Penzance in In the goods of Smith*, 16 W.R. (Eng.) 1130. **D**

- (9) **Where the foreign will leaves property in England, it must be proved in England also.**

A will made abroad of property in England, must be proved in England also, though the English Court will adopt the decision of the Court of the foreign country in which the testator was domiciled. *I Will. Exors.*, 10th Ed., 271. **E**

N.B.—The validity and proof of wills made by British subjects domiciled out of England, is now governed by Lord Kingsdown’s Act, 24 & 25 Vic. C. 114, for the provisions of which, see *I Will. Exors.*, 10 Ed., 281, *et seq.* **F**

- (10) **Provision for grant of letters of administration to foreign Consuls in the case of foreign subjects.**

(a) By S. 8 of the Administrators-General and Official Trustees Act V of 1902, provision is made for grant of letters of administration to foreign consular officers for the estates of the subjects of such foreign state dying in British India. **G**

I.—“Administration with copy annexed of authenticated copy of will proved abroad”—(Concluded).

(b) For a similar provision in England, see S. 4, St. 24 and 25 Vict. C. 121; cited in I Wills. Exors, 10th Ed., 339. H

(11) Probate of will in a foreign language.

If a will is in a foreign language, probate will be granted of a translation of the same by a Notary Public. I Will. Exors. 10th Ed., 299. I

(12) Province, definition.

As to this, see S. 3, *supra*. J

N.B.—See also notes under S. 28, *infra*.

Probate only to appointed executor 1.

6. Probate can be granted only to an executor appointed by the will. [S. 181.]

(Notes).

General.

(1) Corresponding Indian Law.

This section corresponds to S. 181 of the Indian Succession Act, X of 1865. K

(2) S. 6 must be read with S. 7.

See 22 W.R. 174 (175). L

I.—“Probate only to appointed executor.”

(1) Executor, definition.

For definition of “Executor,” see S. 3, *supra*. M

(2) Executor and co-adjutor—Difference.

As to this, see notes under S. 3, *supra*. N

(3) Executor can only be appointed by will.

As to this, see notes under S. 3, *supra*. O

(4) Who are capable of being executors.

All persons who are capable of making wills and some others besides, are capable of being made executors. I Will. Exors. 10th Ed., 158. P

(5) An alien can be executor.

An alien is capable of being executor. I Will. Exors., 10th Ed., 159. Q

(6) A limited company can be executor.

a) Where a limited company is appointed executor, administration with the will annexed will be granted to their nominee, and the bond of the company as surety will be accepted. *In bonis* Hunt, (1896), p. 288. R

(b) Where a limited company were appointed executors, it was held that the appointment was of the persons composing it individually and each of the members was accordingly entitled to prove the will. *Re Fernie*, 6 Notes of Cas. 657. S

(c) Probate will not be granted to a limited company and individuals jointly. *In bonis* Martin, 90 L.T. 264. T

1.—“*Probate only to appointed executor*”—(Continued).(7) **A partnership firm can be executor.**

Where a partnership firm is appointed executor, each of its members is entitled to be joined in the probate. *In the goods of Fernie*, 6 Notes of Cas. 657. U

(8) **Where executor becomes lunatic—Procedure.**

Where an executor or administrator becomes *non compos*, the Court may commit administration to another. See S. 33, *infra*. V

(9) **Where executor is incapacitated from illness—Procedure.**

Where an executor was incapacitated from illness, the Court granted administration with the will annexed to residuary legatee for life for the use and benefit of the executor till his recovery. *In the goods of Ponsonby*, 1895, p. 287, cited in *Hend.*, 3rd Ed., 251. W

(10) **Judge incompetent to refuse Probate to executor named in will.**

(a) There is no provision in the Probate Act which gives the District Judge any discretion to refuse an application for probate by an executor named in the will, and considered qualified by the testator to act as such, on the ground that, in the opinion of the Judge, he is not a fit and proper person to be entrusted with that office. 21 C. 195. X

(b) S. 85 of the Probate Act, 1881, enacts that it is within the discretion of the Court to refuse to grant an application for letters of administration, but no such direction is given in regard to an application for probate by a person selected by a testator of the administration of his estate. 20 A. 189 (191) following 21 C. 195. Y

(11) **Bad character of executor, no bar to probate.**

The Court will not pass over an executor by reason of his bad character only. *In the goods of Samson*, 3 P. & D. 48. Z

(12) **Poverty or insolvency of executor, whether a bar to probate or a ground of removal.**

(a) The Court cannot refuse to grant probate to a person appointed executor, on account of his poverty or insolvency. 1 Will. Exors., 10th Ed., 162. A

(b) The executor's title is not defeasible by bankruptcy, insolvency or even felony. *Smithurst v. Tamlin & Banks*, 2 Sw. & Tr. 147. B

(c) But, in England under the Judicial Trustees Act, 1896, the Court has power to remove an executor on ground of his bankruptcy and appoint a judicial trustee or receiver in his place. 1 Will. Exors., 10th Ed., 162 (n) citing *Re Ratcliff*. 1898, 2 Ch. 352. C

(d) Although probate cannot be refused to an insolvent executor, the Court may exercise control by requiring security or appointing a Receiver. *Hend.*, 3rd Ed., 250. D

(13) **Mere weakness of mind, no bar to appointment as executor.**

Mere weakness of mind is not sufficient to disqualify a person from being appointed executor. *Evans v. Tyler*, 2 Rob. 131, 132. E

I.—“*Probate only to appointed executor*”—(Continued).(14) **Appointment of executor may be absolute or limited.**

The appointment of executor may be absolute or limited in time, or place or as to subject-matter, or conditional. I Will. Exors. 10th Ed., 175, *et seq.* F

(15) **Probate, definition.**

For definition of “Probate,” see S. 3, *supra*. G

(16) **What instruments will not be admitted to probate.**

(a) A paper which neither disposes of property nor appoints an executor will not be admitted to probate. *Van Straubensee v. Monck*, 3 Sw. & Tr. 6. H

(b) But a codicil merely revoking or confirming former wills though not containing any disposition of property, will be admitted to probate. *Brenchley v. Still*, 2 Rob. 162. I

(c) A document executed by a *Mohant* merely appointing a person as the next *sebit* or manager, but without making any disposition of the properties belonging to the *akhrā*, was held not to be a will which could be admitted to probate. 32 C. 1032 = 9 C.W.N. 1021 = 2 C.L. J. 50 n; see, also, 22 C. 843 = 22 I.A. 94. J

(d) The bare nomination of executor entitles a will to probate. I Will. Exors., 10th Ed., 157. K

(e) As a general rule, a document which disposes of no property, has no testamentary character, so as to enable the Court to grant probate of it. *Van Straubensee v. Monck*, 3 Sw. & Tr. 6. L

(f) A will merely appointing testamentary guardians is not entitled to probate. *In the goods of Mortan*, Sw. & Tr. 422; *Lady Chester's case*, 1 Vent. 207; *Gilliat v. Gilliat*, 3 Phil. 222. M

(g) A will to take effect upon a contingency cannot be admitted probate, if the contingency does not happen. *In the goods of Hugo*, 2 P.D. 72. N

(17) **Papers incorporated in will will also be admitted to probate.**

Papers incorporated in a will by reference are also included in the probate as a general rule. See S. 51, Act X of 1865. O

(18) **The Court may grant probate of will in part and refuse as to part.**

(a) Where the Court is satisfied that a particular clause in a will has been inserted by fraud, without the knowledge of the testator, or by forgery after his death, or even if he has been induced to make it a part of his will by fraud, probate will be granted of the will without that clause. *Barton v. Robins*, 3 Phil; 455 (n). *Plume v. Beale*, 1 P. Wms. 388; *Allen v. McPherson*, 1 H of L. 191, cited in I Will. Exors., 10th Ed., 291. P

(b) Probate may be granted of a portion of a will after striking out or omitting such portions of it as are proved to have been inserted without the testator's knowledge. 1 C.L.J. 109, following *Rhodes v. Rhodes*, 7 Ap. Cas. 192; *Allen v. McPherson*, 1 H. L. C. 191; *Morrell v. Morrell*, 7 P.D. 68. Q

(c) See, also, notes under S. 42, *infra*. R

1.—“*Probate only to appointed executor*”—(Continued).

- (19) But where whole estate vested in executor, probate cannot be granted limited to part of the estate.

As to this, see notes under S. 4, *supra*.

S

- (20) Testator may delegate the appointment of executor to another.

(a) A testator may delegate the power of appointing executors to another who may appoint himself. *In bonis* Cringan, 1 Hag. 548; *In bonis* Ryder, 2 Sw. & T. 127.

T

(b) Whether probate would be granted under the Act to an executor appointed in this manner, has not yet been decided. Hend. 3rd Ed., 251; but *e. infra*.

U

(c) There is nothing in S. 6 or 7 or in the definition of “Executor,” imposing an obligation on a testator himself to name his executor, and preventing him from appointing as his executor such person as some one selected by him may name for that purpose. 5 Bom. L.R. 639, citing *Jackson v. Poullet*, Rob. 344; *Re Deickman*, 3 Cur. 107; *Re Cringan*, 1 Hagg 548; *Re Ryder*, 2 W. & T. 128.

Y

(d) A testator may authorise the survivor or survivors of his executors to appoint another or others to keep their original number in tact. *In bonis* Deickman, 3 Curt. 123.

W

- (21) In the absence of express appointment, the person contemplated “executor according to the tenor” will be granted probate.

Where a testator has omitted to appoint an executor under his will, the Court will appoint as executor and grant probate to the person whom it would appear from the tenor of the will the testator contemplated should be executor. 25 C. 65.

X

- (22) Who is an executor according to the tenor.

As to this, see notes under S. 7, *infra*.

Y

- (23) Person not named as executor can apply only for letters of administration.

A person not named as executor in the will cannot apply for probate, but only for letters of administration with the will annexed. 22 M. 345.

Z

- (24) Universal legatee entitled not to probate, but only to letters of administration.

(a) Where a Hindu Will mentioned no executor, the testator's widow who was universal legatee under the will, was held entitled to probate, as executor by necessary implication. 7 B.L.R. 563, *folly*. *In the goods of* Baylis, 1 P. & M. 21; but see, *infra*.

A

(b) A universal legatee is not entitled to probate, but only to letters of administration with the will annexed. 19 C. 532; not *folly*. 7 B.L.R. 563; see S. 19, *infra*.

B

(c) Under S. 6 of the Probate Act, probate can be granted only to an executor appointed by the will, and an universal legatee is only entitled under S. 19 of the Probate Act, to a grant of letters of administration with the will annexed. 6 C.W.N. 787.

C

- (25) Probate granted to a universal legatee is invalid *ab initio*.

Probate granted to an universal legatee by mistake is invalid from the first, and the person to whom such grant was made cannot be constituted an executor so as to be empowered to exercise any of the powers conferred on executors under the Probate Act. 6 C.W.N. 787.

D

I.—“*Probate only to appointed executor*”—(Concluded).

- (26) Right of executor to obtain probate is different from right of his representative to obtain letters of administration.

The right of an executor to obtain probate of the will is different in its nature from the right of the executor's widow as his legal representative to obtain letters of administration with a copy of the will annexed. 36 C. 799. E

- (27) Wrong name of executor in will may be corrected in the probate.

Where an executor has been wrongly named in the will, probate will be granted to him in his right name. *In the goods of Shuttleworth*, 1 Curt 911. F

- (28) Executor's name inserted without authority in will can be struck out.

An executor's name can be struck out where it is proved to have been inserted in the will without the testator's sanction. *Morrell v. Morrell*, 7 P.D. 68. G

- (29) Executor renouncing as such cannot take administration in another character.

As to this, see notes under S. 17, *infra*. H

- (30) How far an executor is entitled to remuneration.

(a) An executor's office being voluntary and gratuitous, an executor is not entitled to any allowance for personal trouble and loss of time in the execution of his duties; therefore, all bargains which secure remuneration to the executor out of the estate itself ought to be discouraged, as tending to dissipate the property. See *Robinson v. Pett*, 3 P. Wms. 249. I

(b) But a contract to pay remuneration to an executor for performance of his duties, such remuneration not coming out of the assets of the estate was held valid and not opposed to public policy. 22 C. 14. J

(c) Where the executor being unable to collect the debts himself, employs an agent to do the same, he is entitled to the expenses thereby incurred. *Bonithone v. Hocmare*, 1 Vern. 216; *Hopkinson v. Roe*, 1 Beav. 180. J1

(d) A solicitor-executor is entitled to payment of his costs for any professional service rendered by him for the benefit of the estate. *New v. Jones*, 1 M. & J. 668 (n). K

(e) An attorney of an absent executor is not entitled to commission. See 6 C. 70 (77). L

N.B.—See S. 56 of the Administrator-Generals Act, II of 1874, now repealed by S. 4 of Act V of 1902.

Appointment ex- 7. The appointment may be express or by [S. 182.]
press or implied, necessary implication ¹.

Illustrations.

(a) A wills that C be his executor if B will not. B is appointed executor by implication.

(b) A gives a legacy to B and several legacies to other persons, among the rest to his daughter-in-law, C, and adds, “but should the within-named C be not living, I do constitute and appoint B my whole and sole executrix.” C is appointed executrix by implication.

(c) A appoints several persons executors of his will and codicils, and his nephew residuary legatee, and in another codicil are these words :—" I appoint my nephew my residuary legatee to discharge all lawful demands against my will and codicils, signed of different dates." The nephew is appointed an executor by implication.

(Notes).

General.

(1) **Corresponding Indian Law.**

This section corresponds to S. 182 of the Indian Succession Act, X of 1865. **M**

(2) **Section is copied from Williams.**

The section appears to be compiled almost *verbatim* from cases collected in the work of Mr. Williams on Executors. *Per Couch, C.J.*, in 7 B.H.C.R. A.C.J. 64 (66). **N**

1.—"The appointment may be express or by necessary implication."

(1) **Executor by implication is called executor "according to the tenor."**

An executor by implication is usually called executor *according to the tenor*. *Hend. 3rd Ed.*, 252. **O**

(2) **"Necessary implication," what it means.**

"Necessary implication," means, not actual necessity, but so strong a probability of intention that an intention contrary to that which is imputed to the testator cannot be supposed. *Per Lord Eldon*, in *Wilkinson v. Adam*, 1 Ves. & B. 664. **P**

(3) **"Executor according to the tenor" meaning.**

An executor according to the tenor is one to whom, though not expressly nominated in the will, the testator, by any word or circumlocution recommend or commit the charge and office or the rights which appertain to an executor. *I Will. Exors.*, 10th Ed., 165, and see cases therein cited. **Q**

(4) **What is necessary to constitute a person "executor according to the tenor."**

(a) To constitute one an executor according to the tenor, there must be words importing a general power to receive and pay what is due to and from the estate of the deceased. *In bonis Jones*, 2 Sw. and Tr. 155. **R**

(b) Though no executors are expressly appointed, if the testator has directed any person to pay his debts and administer the estate, or to pay his debts only, such person will be executor according to the tenor. *Theob. 6th Ed.*, 97 and see cases therein cited. **S**

(c) Where a testator by his will names a person to discharge any duties under the will without expressly appointing him executor, the rule is, that, unless it can be gathered from the will that the testator intended such person to pay the debts and legacies under the will, such person cannot be held to be the executor. 26 B. 571 = 4 Bom. L.R. 9; *citing In the goods of Punchard*, 2 P. and M. 369; *In the goods of Lowry*, 3 P. and M. 157; 5 C. 756. **T**

(d) In order to constitute one an executor according to the tenor of the will, it must appear on a reasonable construction thereof, that the testator intended that he should collect his assets, pay his debts and funeral expenses and legacies, which are the essential duties of an executor. 6 C.L.J. 453, *citing* 5 C. 756; 26 B. 571; 22 M. 845. **U**

1.—“The appointment may be express or by necessary implication”

—(Continued).

(5) Cases where persons have been held to be “executors according to the tenor.”

- (i) Where a testator appointed his wife H, guardian of his infant children, “in order that of all his property she should carry on the management, and in the testator’s name the management of his firm,” and also appointed two persons to give her advice, *held* that H was by implication appointed sole executrix and was solely entitled to probate. 7. B.H.C.R. A.C.J. 64. **Y**
- (ii) Where a Hindu appointed his wife P to be the sole executrix of his will to carry on all his affairs, distribute certain moneys annually, etc., and then provided :—“In case of the death of my wife P, the said affairs, and distribution of money to be paid by my second wife,” P proved the will and died, *held* that M was entitled to apply for probate, being executrix according to the tenor of the will. 26 B. 571 =4 Bom. L.R. 9. **W**
- (iii) Where, A, under the terms of a Will, although not expressly appointed as executor, was directed to receive and pay the testator’s debts, and to get in and distribute his personal estate, *held* that A must be taken to have been appointed under the will an executor by implication. 5 C. 756=6 C.L.R. 228, referring to *in the goods of Baylis*, 1 P. and M. 21. **X**
- (iv) A request that certain persons shall act for or with an executrix appointed by the will, makes them executors according to the tenor. *In bonis Brown*, 2 P.D. 110. **Y**
- (v) Where a testator appointed A without saying to what office, and afterwards referred to his executor, A was held to be executor. *In bonis Bradley*, 8 P.D. 215. **Z**
- (vi) Where the testator said “I will that A be my executor, if B will not,” it was held that B was executor by necessary implication. *I Will. Exors.*, 10th Ed., 168. **A**
- (vii) Where a testator said “Forasmuch as my brother is dead, I make A my executor,” if the brother is really alive, he will be executor. (*Ibid.*), 169. **B**
- (viii) See also the cases cited under the heading of “Executor” in S. 3, *supra*. **C**

(6) Cases where persons have been held *not* to be executors according to the tenor.

- (i) Where a person was made trustee with a power to pay what was vested in him as trustee to the particular persons for whose use he held it, but without a general power of administration. *Boddicott v. Dalzell*, 2 Cas. temp. Lee. 294. **D**
- (ii) Where the whole personal estate was left to a trustee on trust for a specific purpose. *In the goods of Jones*, 2 Sw. and Tr. 155. **E**
- (iii) Where the will contained only a direction to a person to pay the testator’s debts or funeral expenses out of a particular fund. *In the goods of Davis*, 3 Curt. 748; *In the goods of Toomy*, 3 Sw. and Tr. 562. **F**
- (iv) Where a testatrix left one sovereign each “to the executor and witness of my will,” but named no executor and beneath her signature and opposite the names of the witnesses were the words “executors and witnesses,” *held* that there was no appointment of executors. *In the goods of Woods*, 1 P. and D. 556. **G**

1.—“The appointment may be express or by necessary implication”

—(Continued).

- (v) The facts that a will was addressed to the widow of the deceased and that will bequeathed immovable property to her with powers of sale and mortgage without any right of the sons were held not sufficient to make the widow executor by implication. 5 C.W.N. xeviii. **H**
 - (vi) A mere direction in a will that a person named in a will should pay certain debts out of certain property, does not show any intention on the testator's part that for the general purpose of administration such person should be executor. 22 M. 345, referred to in 6 C.L.J. 453 (460). **I**
- (7) Trustee named in the will, when “executor according to the tenor,” and when not.**
- (i) Trustees nominated by the testator “to carry out this will”, and “for the due execution of this my will,” were held to be constituted executors according to the tenor. *In the goods of Russell*, 1892, P. 380. **J**
 - (ii) Where property is left by will to trustees without words referring to them as executors, they will not be entitled to probate as executors according to the tenor, unless it appears from the will that they have to discharge such duties as executors have to perform. 30 M. 191 = 161 M. L.J. 558. **K**
 - (iii) Unless the Court can gather from the words of the will that a person named as trustee is required to pay the debts of the deceased, and generally to administer his estate, it will not grant him probate as executor according to the tenor. *In the goods of Parnell*, 2 P. and D. 379. **L**
 - (iv) The appointment of a person as sole trustee of a will, will not in itself make him executor according to the tenor. *In bonis* Punchard, 2 P. and D. 369. *In bonis* Lowry, 3 P. and D. 157. **M**
 - (v) Where the whole personal property is left to a trustee on trust for a specific purpose, and no executor is named in the will, such trustee is not entitled to probate as executor according to the tenor. *In the goods of Jones*, 2 Sw. and Tr. 155. **N**
 - (vi) Trustees to whom the residue only is given on trust to pay debts, are not executors. Theob. 6th Ed., 98 citing, *In bonis* Lowe, 7 Tr. 178. **O**
- (8) Person appointed *shebait* of *debutter* property, when “executor according to the tenor,” and when not.**
- (i) The mere fact that a person is appointed *shebait* or trustee of the whole or a large portion of the estate of the testator, is not sufficient by itself to constitute him an executor by implication. But, where the testator uses the word trustee or *shebait*, and at the same time imposes upon the person duties involving the functions of an executor, there is a good appointment as executor by necessary implication. 6 C.L. J. 453. **P**
 - (ii) Where a testator appointed a person as *shebait* for his *debutter* estate and confided to him the execution of the terms of the will, and also appointed some persons as “*osees*” to give the *shebait* sound advice, held that the *shebait* was appointed executor by implication, and that the persons appointed as “*osees*” were merely co-adjutors or overseers. 6 C.W.N. 310; see the case explained in 6 C. L. J. 453 (457). **Q**

1.—“The appointment may be express or by necessary implication” —(Concluded).

- iii) Where a testator had bequeathed the bulk of his estate for the *sheba* of a *thakur* and make certain other dispositions in regard to the rest of the property, *held*, on the construction of the will, that his wife whom he had appointed *shebast* having been confided with the execution of the will was executor by implication, and, as such, entitled to probate. 10 C. W.N. 232, *following* 6 C.W.N. 810. **R**

(9) Person appointed guardian is not “executor according to the tenor.”

- (i) A direction in a will that the plaintiff should take care of the estate during the minority of a son who was to be adopted to the testator, and should provide for the maintenance of the persons named therein, was *held not to make* the plaintiff executor by implication. 20 M. 467. **S**
- (ii) A clause in a will providing that “P and M shall remain trustees, that is, guardians and next friends,” was *held not to make* any appointment of executors either expressly or by implication. 33 C. 657 = 10 C.W.N. 662, *following* 20 M. 467. **T**

(10) A universal legatee is not, as such, executor “by implication.”

- (i) Where a Hindu will mentioned no executor, the testator's widow who was universal legatee under the will, was *held entitled to probate*, as executor by necessary implication. 7 B.L.R. 563, *following* *In the goods of* Beylis, 1 P. and M. 21; *not followed* in 19 C. 582, and *see, infra*. **U**
- (ii) A universal legatee, as such is not an executor according to the tenor, and though empowered to prove the will, is not entitled to probate. *In bonis* Oliphant, 1 Sw. and Tr. 525; *followed* in 15 M. 360. **Y**
- (iii) Where a Hindu died leaving a will whereby he bequeathed all his property whatever (including debts) to two of his sons, who applied for probate of the will, *held*, they were not entitled to probate, not being executors by implication. 15 M. 360; *following* *In the goods of* Thomas Henry Oliphant, 1 Sw. and Tr. 525. **W**
- (iv) In England the practice is to grant administration with the will annexed and not probate, to a universal legatee. *In the goods of* Pryse, 1904, P. 301. **X**

(11) Appointment of executor by implication is not to be favoured.

The appointment of executors by necessary implication is not to be favoured, and the language of the will is not to be strained for this purpose; but in doubtful cases, letters of administration with the will annexed ought to be granted. 6 C.L.J. 453 (460), *per* Mookerji, J. **Y**

(12) An executor for a limited purpose may be subsequently appointed general executor by implication.

A person expressly appointed executor for a *limited* purpose in a *will* may be appointed *general* executor by implication in a *codicil*. *In bonis* Aired, 1 Hagg. 336. **Z**

(13) An “executor according to the tenor” may be admitted to probate jointly with an express executor.

An executor according to the tenor may be admitted to probate jointly with an executor expressly named. *Powell v. Stratford*, 3 Phil. 118. *In the goods of* Brown, 2 P.D. 110. *See Illus. to* S. 9, *infra*. **A**

3. 183.] Persons to whom probate cannot be granted.

8. Probate cannot be granted to any person who is a minor ¹ or is of unsound mind ².

(Notes).

General.

Corresponding Indian Law.

(a) This section corresponds to S. 183 of the Indian Succession Act, X of 1865, but omits the words "nor to a married woman without the previous consent of her husband" at the end of the section. **B**

(b) The words relating to the married woman have been omitted in the Probate and Administration Act, because, as the Select Committee say in their Report on the Probate and Administration Act, the imposition of such a condition would be inconsistent with the proprietary status accorded to married women among a large proportion of the persons for whom the Act is intended, and would confer a power on the husband, which would, in many cases, be likely to be abused. Hend. 3rd Ed., 254. **C**

1.—"Probate cannot be granted to any person who is a minor."

(1) Minor, definition.

As to this, see S. 3, *supra*. **D**

(2) The period of minority fixed in the Act applies to all persons whether domiciled in British India or not.

(a) S. 3 of the Probate Act defining the word "minor" fixes the limit of the period of disability for the purpose of the Act, not only for persons domiciled in British India, but for any other persons whether they be aliens or not. 21 C. 911. **E**

(b) Thus, the Court dismissed an application for letters of administration by a person domiciled in the Native State of Bikanir, who being more than 16, had by the law of that State attained his majority, though still under 18. 21 C. 911. **F**

(3) Where infant sole executor—Procedure.

(a) Where an infant is appointed sole executor, he cannot act as such until he attains majority, and until such time, administration with the will annexed will be granted to his guardian or such other person as the Court thinks fit. 1 Will. Exors., 10th Ed., 159, *citing In the goods of Stewart*, 3 P. and D. 244. **G**

(b) See also S. 31, *infra*. **H**

(4) Where infant one of several executors—Procedure.

Where of several executors, one is a minor, probate will be granted to the rest. 1 Will. Exors., 10th Ed., 160. **I**

2.—"Or is of unsound mind."

(1) Sound mind—Definition in S. 12, Indian Contract Act, IX of 1872.

A person is said to be of sound mind for the purpose of making a contract, if, at the time when he makes it, he is capable of understanding it, and of forming a rational judgment as to its effect upon his interests. **J**

2.—“Or is of unsound mind”—(Concluded).

(2) Meaning of “unsound mind” in the Lunacy Act, XXXIV of 1858.

The term “unsound mind” in the Lunacy Act XXXIV of 1858, S. 1, comprehends imbecility whether congenital or arising from old age, as well as lunacy or mental alienation resulting from disease. 7 B. 15. **K**

(3) Where executor becomes lunatic—Procedure.

(a) Idiots and lunatics being incapable of being executors, the Court may, if an executor becomes *non compos*, commit administration to another. 1 Will. Exors., 10th Ed., 164, citing *Hills v. Mills*, 1 Salk. 36; *Evans v. Taylor*, 2 Rob. 128. **L**

(b) See, also, notes under S. 33, *infra*. **M**

Grant of probate to several executors simultaneously or at different times¹.

9. When several executors are appointed, probate may be granted to them all simultaneously or at different times.

[S. 184]

Illustration.

A is an executor of B's will by express appointment, and C an executor of it by implication. Probate may be granted to A and C at the same time, or to A first and then to C, or to C first, then to A.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 184 of the Indian Succession Act, X of 1865. **N**

1.—“Grant of probate to several executors simultaneously or at different times.”

(1) The Court is bound to grant probate to an executor even after it has been granted to his co-executor.

If the will be proved, the Court has no discretion, but must grant probate to an executor, even if it has been previously granted to his co-executor. 20 A. 189. **O**

(2) Procedure in Calcutta where one of several executors applies for probate.

The procedure followed by the High Court of Calcutta is to grant probate to the executor applying, reserving liberty to the other executor. *Hond.* 3rd Ed., 255. **P**

(3) Where there are several executors, the acts of one are deemed to be the acts of all.

(a) Where several executors are appointed in conjunction, they are all considered in the light of an individual person, and by consequence, the acts of any of them in respect of the administration of the effects are deemed to be the acts of all. 1 Will. Exors., 10th Ed., 715. **Q**

(b) See, also, S. 92, *infra*. **R**

1.—“Grant of probate to several executors simultaneously or at different times”—(Concluded).

- (4) **Executors who have not proved may call for an inventory and account from those who have proved.**

Where of several executors, some alone applied for probate, it was held that the executors who have not proved may call for inventory and account from those who had proved and were managing the estate, as under S. 4 the property of the deceased vested in the applicants as well, and as they could have applied for probate at any time. 27 B. 281. **S**

- (5) **Different executors may be appointed for different properties.**

A testator may appoint special executors of any portion of his property. Theob. 6th Ed., 96. **T**

- (6) **Different executors may be appointed for different countries.**

A testator may appoint different executors for different countries. Theob. 6th Ed., 96. *citing In bonis* Wallich, 1 Sw. & Tr. 423; *Belto v. Leite*, 1 Sw. & Tr. 456. **U**

- (7) **One executor may be substituted for another in a certain event.**

A testator may *substitute* other executors in the event of the absence or death of those appointed, and may appoint a person executor if and when he returns to England. Theob. 6th Ed., 96; *citing In bonis* Langford, 1 P. & D. 458; *In bonis* Foster, 2 P. & D. 304; *In re Arbib*, 1891, 1 Ch. 601. **Y**

- (8) **When a substituted executor can apply for probate.**

(a) In such a case, the substituted executor cannot propound the will, till the person first named executor has been cited to accept or refuse the office. *Smith v. Crofts*, 2 Cas. temp. Lee. 557. **W**

(b) If the original executor once accepts the office and afterwards dies intestate, the substitutes are all excluded. 1 Will. Exors., 10th Ed., 172. **X**

(c) But, if the testator's intention was that the substitution should take place on the death of the original executor whether in the testator's lifetime or afterwards, on the death of the original executor, although he has proved the will, the substitute will be admitted to the office. *Ibid.*, *citing In the goods of* Foster, 2 P. & D., 304. **Y**

(d) Where a testator appoints an executor and provides that in case of his death, another should be substituted, then, on the death of the original executor, though he has proved the will, the executor so substituted may be admitted to the office, if it appear to have been the testator's intention that the substitution should take place on that event, whether happening in the testator's lifetime or afterwards. 26 B. 571=4 Bom. L.R. 9, *citing In the goods of* Lighton, 1 Hagg. 235: *In the goods of* Johnson, 1 Sw. & Tr. 17. **Z**

10. If a codicil be discovered after the grant of probate, a separate probate of that codicil may be granted to the executor, if it in no way repeals the appointment of executors made by the will.

Procedure when
different executors
appointed by codicil.

If different executors are appointed by the codicil, the probate of the will must be revoked, and a new probate granted of the will and the codicil together.

(Notes).

General.

(1) Corresponding Indian Law.

This section corresponds to S. 185 of the Indian Succession Act, X of 1865. A

(2) Corresponding English Law.

This section is copied from Tristram and Coote's Probate Practice, 13th Ed., 43,179, citing *Langdon v. Rooke*, 1 N.C. 254; Wm. Beatson, 6 N. C. 13. B

I.—“Separate probate of codicil discovered after grant of probate.”

(1) Codicil, definition.

As to this, see S. 3, *supra*. C

(2) S. 10 is an exception to the general rule that a will and its codicils are admitted to probate “together.”

The general rule being that a will and its codicils are admitted to probate “together,” S. 10 provides for those exceptional cases where a separate grant of a codicil is made. See *Langdon v. Rooke*, 1 Notes of Cas. 254; Wm. Beatson, 6 Notes of Cas. 13. D

(3) When person named executor in the prior instrument is entitled to probate and when not.

(a) Where more than one paper is entitled to probate as containing the last will of the deceased, each person named executor in the several papers will be entitled to probate, unless his appointment is in any way repealed by a paper executed subsequently to that in which he is named. Hend. 3rd Ed., 255 and see the cases therein cited. E

(b) Where there are several testamentary papers not inconsistent and appointing sole executors, probate will be granted to all. *In bonis Graham*, 3 Sw. and T. 69; *Geaves v. Price*, 2 Sw. and T. 442; Sw. and T. 71. F

(4) Court reluctant to exclude from probate executors revoked by inference.

The Court is always reluctant to exclude from probate executors whose appointment is revoked only by inference. *Per Sir Wilde in The goods of Lowe*, 3 Sw. and Tr. 478. G

(5) Appointment of executors *per se* is no test of revocation.

(a) The mere appointment of executors is not conclusive of the testator's intention to constitute a substantive Will. *Richards v. Queen's Proctor*, 18 Jur (Eng.), 540. H

(b) The fact that two Wills of different dates appoint different persons as sole executors will not cause the later Will to revoke the earlier one. In such a case, if the Wills are not inconsistent otherwise, probate may be granted to both the executors. *In bonis Leese*, 2 Sw. and T. 442; *In bonis Graham*, 3 Sw. and T. 69. I

(c) Where a second Will appoints no fresh executor, probate of both Wills may be granted to the executor named in the first Will. *In bonis Griffith*, 2 P. and D. 457. J

1.—“Separate probate of codicil discovered after grant of probate”—(Cld.).

- (6) When appointment of executors in prior instrument is revoked by a subsequent one.

(a) Re-appointment in a subsequent will or codicil of some of the executors appointed by the will together with new executors does not revoke the appointment of executors contained in the will. *In bonis* Leese, 2 Sw. and T. 442; *In re* Lloyd, 6 Eq. 348. **K**

(b) But a codicil appointing a person “sole” executor of the will revokes the appointment of executors made by the will. *In bonis* Lowe, 3 Sw. and T. 478; *In bonis* Baily, 1 P. and D. 628. **L**

- (7) Where different wills deal with different properties—Procedure.

Where a testator disposes of separate properties in different countries by different wills, probate may be granted of each separately without incorporating the other. *In the goods of* Schenley, 8 C.W.N. cclxxiv. **M**

- (8) Procedure where codicil discovered after grant of letters of administration with will annexed.

For —————, see S. 49, *infra*. **N**

[S. 186.]

Accrual of representation to surviving executor¹.

11. When probate has been granted to several executors, and one of them dies, the entire representation of the testator accrues to the surviving executor or executors.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 186 of the Indian Succession Act, X of 1865. **O**

1.—“Accrual of representation to surviving executor.”

- (1) The rule of survivorship applies even where probate has not been taken.

Even when probate has not been granted, the office becomes vested in the survivor or survivors. See S. 93, *infra*. *Hend.* 3rd Ed., 256. **P**

- (2) Transmission of executorship on death of one of several executors—English and Indian law same.

Under S. 11 of the Probate Act the entire representation of the estate of the testator, will, upon the death of one executor, accrue to the surviving executor or executors, and his right as executor will not be transmitted to his heirs, which is consistent with the rule which prevails in England. 9 C.L.J. 383 = 13 C.W.N. 557, referring to *Flanders v. Clarke*, 3 Atk. 509; *Jacomb v. Harwood*, 2 Ves. Sen. 265. **Q**

- (3) Transmission of executorship of death of sole executor or sole surviving executor—English and Indian Law different.

(a) Under English Law, where there is a sole executor or sole surviving executor who has proved the will, the executor of such executor represents the original testator, though not the administrator of such executor. *I Will, Exors.*, 10th Ed., 180. **R**

1.—“Accrual of representation to surviving executor”—(Concluded).

- (b) And if there are several executors, no interest is transmissible, except to the executor of the survivor. I Will. Exors., 10th Ed., 182. **S**
- (c) In such a case, no new probate of the original will is necessary. *Wankford v. Wankford*, 1 Salk. 309. **T**
- (d) But in India, on the death of sole executor, his executor does not represent the original testator. See 12 B.L.R. 423. **U**
- (e) Still in India, it is competent for a testator to empower a *shebait* executor to appoint his successor. See 12 C. 375 ; 7 B. 19. **Y**

12. Probate of a will when granted establishes the will from the death of the testator, and renders valid all intermediate acts of the executor as such. [S. 188]

Effect of probate 1.

(Notes).

General.

(1) Corresponding Indian Law.

This section corresponds to S. 188 of the Indian Succession Act, X of 1865. **W**

(2) The section is a condensed statement of the English Law.

This section is a condensed statement of the English Law, which regards probate as the authenticated evidence of the will itself from which the executor derives his title, and by virtue of which the property of the testator vests in him from the death of the testator. 8 B. 241 (254) *per Sargant, C.J.* **X**

(3) Scope of the Section.

S. 12 of the Probate Act validates the acts of executors previous to the grant of probate only when such probate remains in force and is not revoked. 3 C.W.N. cccii. **Y**

(4) Section applicable to letters of administration with the will annexed.

The first portion of the section is apparently applicable to the case of letters of administration with the will annexed. Ph. & Trev. 356. **Z**

1.—“Effect of probate.”

(1) No difference in the effect of probate upon real and personal property.

The remarks of Field, J. in 6 C. 460 (466) that the Indian Succession Act makes no distinction as to the effect of probate of a will upon real and personal property, would seem to apply equally to S. 12 of the Probate and Administration Act. **A**

(2) Executor derives title from the will and not from the probate.

An executor derives his title from the will and not from the probate. *Smith v. Milles*, 1 T.R. 475. See, also, 4 C. 360 (362) *Per Markby, J.* **B**

(3) Probate relates back to the testator's death.

The probate, when produced, relates back to the time of the testator's death. I Will. Exors., 10th Ed., 214. **C**

I.—“Effect of probate”—(Continued).

(4) What the executor may do before probate.

Before proving the will, the executor may do all the acts which are incident to his office, except only some of those which relate to suits. I Will. Exors., 10th Ed., 220. D

(5) Examples of acts which an executor may do before probate.

- (i) He can take possession of assets, sell or otherwise dispose of same. *Hend.* 3rd Ed., 260.
- (ii) He can release debts. *Re Stearns*, 1897, 1 Ch. 422, 430.
- (iii) He can distrain. *Whitehead v. Taylor*, 10 A. & E. 211.
- (iv) He can assent to a legacy. *Johnson v. Warwick*, 17 C.B. 516.
- (v) He can demise. *Roe Summersett*. 2 W. Bl. 694, cited in *Hend.* 3rd Ed., 260. E

N.B.—Even though the executor who has performed any of the above acts should die before proving the will, yet the acts stand good. *Brazier v. Hudson*, 8 Sim. 67; *Johnson v. Warwick*, 17 C.B. 526, cited in *Hend.* 3rd Ed., 260. F

(6) But, when these acts are relied on, a subsequent probate must be shown.

But, if the acts done by an executor are relied on by an assignee or legatee, he must show a subsequent probate or administration with the will annexed. I Will. Exors. 10th Ed., 221-2. G

(7) In England an executor can *commence* actions before probate, and it is sufficient if the probate is produced in the course of the trial.

- (a) In England, although an executor cannot *maintain* actions before probate, yet, he can *commence* them, for the probate, though obtained after action brought, when produced, relates back to the death of the testator so as to perfect the will from that period. I Will. Exors., 10th Ed., 224-5. H
- (b) An executor may obtain an injunction to protect the estate, and may also petition in bankruptcy or for a winding up order, provided he obtains probate before the receiving order. *Rogers v. Jones*, 7 Taunt. 147; *Re Masonee & Gl. Life Ass., Co.*, 32 Ch. D. 373; cited in *Hend.* 3rd Ed., 260. I
- (c) The Court has power to stay proceedings until probate is taken out. *Taru v. Commercial Bank*, 12 Q.B.D. 294; cited in *Hend.* 3rd Ed., 260. J

(8) But, in India actual grant of probate is necessary before suit.

But, in India, under the C.P.C., Act V of 1908, O. 7, r. 4, where the plaintiff sues in a representative character, the plaintiff should show not only that he has an actual existing interest in the subject matter, but that he has taken the steps necessary to enable him to institute a suit concerning it. K

(9) An executor acting probate can be sued as such.

Where an executor has elected to administer or intermeddle with the estate, he may be sued even before probate by the creditors of the deceased, or even by a residuary legatee for account. I Wills. Exors., 10th Ed., 226. L

I —“Effect of probate”—(Continued).

(10) Effect and conclusiveness of probate.

As to this, see Ss. 59 and 82, *infra*.

L 1

(11) Probate is conclusive as to the appointment of executors and the validity and contents of the will.

- (i) A probate unrevoked is, in English Law, conclusive in any Court as to the appointment of executor and the validity and contents of the will as regards both real and personal property; and the will cannot be impeached by evidence even of fraud. I Will. Exors., 10th Ed., 431; see *Allen v. Mc Pherson*, 1 H of L. 191; see, also, 2 Smith. L.C. 827. **M**
- (ii) Upon this principle, payment of money to an executor who has obtained probate of a forged will is a good discharge to the debtor of the deceased, even though the probate be afterwards revoked. *Allen v. Dundas*, 3 T.R. 125. **N**
- (iii) The probate is only conclusive as to the appointment of executors and the validity and contents of the will. 12 B. 164 (166). **O**
- (iv) A grant of probate (or letters of administration with the will annexed) by a competent Court, is conclusive evidence of the representative character of the grantee, whether the will is governed by the Hindu Wills Act or not. See Indian Evidence Act, I of 1872, S. 41; S. 242, *infra* and S. 59, *infra*; Ph. & Trev. 341; see, also, 14 C. 861. **P**
- (v) Probate has a twofold office, which, besides granting administration, authenticates the will and is evidence of the character of the executor, *Mason v. Swift*, 8 Beav. 368. **Q**
- (vi) See, also, S. 59, *infra*. **R**

(12) Probate is conclusive that the will was executed according to law.

Probate of a will is also conclusive evidence that it was executed in due form according to the law of the country where the testator was domiciled at the time of his death. *Whicker v. Hume*, 7 H.L.C. 124. **S**

(13) Probate is conclusive as to every part of the will.

Probate is conclusive as to every part of the will in respect of which it has been granted. *Plume v. Beale*, 1 P. Wms. 888. **T**

(14) Probate is the evidence against all the parties interested under will.

Probate is the evidence of the will against all persons interested under the will. 8 B.L.R. 208. **U**

(15) Probate is conclusive evidence of the *factum* of the will.

Probate is conclusive evidence of the *factum* of the will. Ph. & Trev. 341. **Y**

(16) In proceedings between strangers, probate is *not* evidence of genuineness of will.

Where a person obtains probate of the will of a deceased person, in proceedings between strangers, the probate is neither conclusive nor admissible to show the genuineness of the will. *R. v. Buttery*, Russ. and Ry. 3442; *R. v. Gibson*, Rus. and Ry. 398n. **W**

(17) Probate is not conclusive as to any *collateral* matter.

Probate is not conclusive evidence of any collateral matter, *e.g.*, of the death of the testator. *Thompson v. Donaldson*, 3 Esp. N.P.C. 63. **X**

1.—“Effect of probate”—(Concluded).

(18) Probate is no bar to a prosecution for forgery.

Thus, on a charge of forging a will, probate of the will is not conclusive evidence of its validity so as to bar the prosecution. *R. v. Buttery*, Russ. & Ry., C.C. R. 342, cited in 1 Will. Exors., 10th Ed., 440. Y

(19) Legal consequences of grant of probate.

When the probate is granted, it operates upon the whole estate and by S. 12 it establishes the will from the death of the testator, and renders valid all intermediate acts of the executor as such. The property vests in the executor by virtue of the will, not of the probate. The will gives the property to the executor; the grant of probate is the method which the law specifically provides for establishing the will. So long as the probate exists it is effectual for that purpose. *Per Markby, J.* in 4 C.L.R. 175=4 C. 360 (362) cited in 31 B. 418. Z

(20) Grant of probate will not affect rights of objector.

Upon a *bona fide* application for probate of a will, it is not the province of the Court to which the application is made to go into questions of title with reference to the property of which the will purports to dispose. The grant of probate does not prejudice the rights of any person who claims any such property. 4 C. 1. A

(21) Refusal to grant probate—Effect.

The refusal to grant probate does not conclusively show that the will propounded is not the genuine will of the testator nor does it render probate necessary in cases in which it was optional for the party interested under the will to apply for it; nor does it bar fresh application for probate by the executors, when they are in a position to support it with more complete proof. 21 B. 563 (566, 567). B

(22) Dismissal of application for default no bar to a fresh application.

The dismissal of an application for probate for default of the executor and not on the merits is no bar to a fresh application to propound the will either by another person claiming an interest under the will or by the executor himself. 14 C.W.N. 924. C

(23) An order for probate without an actual grant, ineffectual.

(a) An order for probate without an actual grant thereof does not prove the will, and an application for probate does not show the executor's acceptance of the trust. *Mohamdu v. Pitchay*, (1894) Ap. Cas. 437; cited in *Hond.* 3rd Ed., 258. D

(b) An executor who has obtained an order for the grant to him of probate but took no further steps to complete the grant and who in no way intermeddled with the estate cannot properly represent the estate in a suit brought against it. And a decree purporting to have been passed against such an executor does not bind the estate. 14 C.W.N. 256=2 Ind. Cas. 818. E

(24) A person intermeddling with the estate before probate is an executor *de son tort*.

Probate is necessary to complete the title of a rightful executor, and until it is actually taken out, a person intermeddling with the assets constitutes himself executor *de son tort*. 21 B. 400. F

(25) Acts done under a forged will are void.

Where a will was declared to be a forgery, and therefore void *ab initio*, any acts done by a person under any title created by that will, must be held to be void in law. 6 C.W.N. 787. G

Miscellaneous.

(1) Grounds on which probate could be impeached in a Civil Court—Effect of S. 44 of the Evidence Act.

(a) The only grounds upon which probate could be impeached in a Civil Court are those stated in S. 44 of the Indian Evidence Act, namely—that the probate was granted by a Court not competent to grant it, or that it was obtained by fraud or collusion, which means fraud or collusion upon the Court, and perhaps also fraud upon the person disinherited by the will : but not on the ground that the will was never executed by the testator or was procured by a fraud practised upon him. *Per White, J.*, in 6 C. 460 (462-463). H

(b) By S. 44 of the Indian Evidence Act it is provided that any party to a suit or other proceeding may show that any judgment, order or decree, which is relevant under Ss. 40, 41, or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion. See S. 44, Act I of 1872. I

(2) No Court other than a Court of Probate can go behind the grant.

No Court other than a Court of Probate can go behind the grant and interpret and modify its terms by the provisions of the will. 32 C. 710. J

(3) Probate does not bar a regular suit for the construction of the will though incidentally decided in the probate proceedings.

(a) A proceeding under the Probate Act is not a suit properly so called, but only takes the form of a suit according to the provisions of the C.P.C. Therefore, the finding of a Court on the construction of a will being incidental and for the purpose of determining the question of the representative title of the applicants, cannot be regarded as concluding a party to an application for probate by *res judicata*, from obtaining a construction of the will in a suit brought by him. 20 C. 888. K

(b) An order granting letters of administration to the defendant in preference to the plaintiff was held to be no bar to the plaintiff bringing another suit to determine questions relating to inheritance or the right to be appointed *shebait*. The decree in such a suit will supersede the grant. 25 C. 354. L

(4) Judgment of Probate Court cannot be barred by judgment in proceeding *inter partes*.

The judgment of a Probate Court granting or refusing probate is a judgment *in rem*, and therefore, the judgment of any other Court in a proceeding *inter partes* cannot be pleaded in bar of an investigation in the Probate Court as to the *factum* of the will propounded in that Court. 16 M. 380 (383). M

(5) When a plea of *res judicata* is effectual in a Probate Court.

(a) The only judgment that can be put forward in a Court of Probate in support of the plea of *res judicata* is a judgment of a competent Court of Probate. 16 M. 380 (384). N

Miscellaneous—(Continued).

(b) To give effect to a plea of *res judicata* upon the ground that the questions in issue in the suit were formerly in issue in probate proceedings, it is necessary that the whole probate proceedings should be in evidence, so as to enable the Court to judge whether the matters in issue in both the suits were the same. 33 C. 116=32 L.A. 244=9 C.W.N. 938=1 C.L.J. 594=2 A.L.J. 758=7 Bom.L.R. 876=15 M.L.J. 336. **O**

(c) A decision *inter partes* in prior proceedings under the Guardian and Wards Act, VIII of 1890, does not operate as *res judicata* on the question of genuineness of the will in a subsequent application for probate. 16 M. 380=3 M.L.J. 121. **P**

(6) Effect of S. 41 of the Evidence Act on questions of probate.

(a) By S. 41, of the Evidence Act, the finding of the Civil Court in such matters as the granting of probate is conclusive. 4 C.W.N. clxxvi. **Q**

(b) By S. 41 of the Evidence Act, a final judgment or order of a Court of probate has the effect of a judgment *in rem*, and is conclusive proof, *inter alia*, that any legal character which it takes away from any person ceased at the time when the judgment declares that it ceased. 16 M. 380 (383). **R**

(c) A final judgment or order of a competent Court, in the exercise of probate jurisdiction, as conferring the status of executor to the grantee of a probate, is conclusive proof of the existence of such status and the fact that the will is genuine. It operates as a judgment *in rem*, and its effect cannot be nullified except by a proceeding for revocation of probate. 31 C. 357=8 C.W.N. 197. **S**

(d) No grant of probate can be made unless the will has been proved in accordance with law, and inasmuch as a grant of probate operates as a judgment *in rem*, the Court must be satisfied that the will has been duly executed and attested. 6 C.L.J. 453 (455) referring to 31 C. 357. **T**

(e) Where the contention was that, as the testator died before the Hindu Wills Act came into force, and as the executor of the will of a Hindu dying before that Act came into force, was a mere manager having no title to the estate, the probate neither conferred a legal character nor declared the executor to be entitled to any legal character, held that S. 41 of the Evidence Act, I of 1872, applied to the case and that whether the probate conferred any legal character upon the executor or not, its effect was to declare the person to whom probate was granted to be entitled to the powers of an executor, whatever his powers as such may be. 14 C. 875 (861). **U**

(7) Where there is a will, the heirs on intestacy do not represent the estate.

In a suit by a creditor against the estate of a deceased debtor, who has died leaving a will, his heirs on intestacy do not represent his estate, and the suit is bad unless the estate is represented. 6 Ind. Cas. 627, following 22 C. 903. **Y**

Miscellaneous—(Continued).

(8) Decree or execution against person in possession of estate of testator before the grant of probate, how far valid.

- (i) A person in possession of the estate of a deceased Hindu under a will of which no probate has been granted, must, till some other claimant comes forward, be treated for some purposes as his representative. And a judgment obtained against such a representative is not a mere nullity, and though it might not be executed against the estate, in the hands of an executor, when he has taken out probate, it is sufficient for a suit being brought against the executor, to have the decree satisfied. 4 C. 342=3 C.L.R. 154. **W**
- (ii) It cannot be rightly said that, because no probate of a will or letters of administration has been granted to any person, no body represents the deceased, at the time of a suit for recovery of a debt from the latter's estate. 30 C. 1044 (1057) referring to 4 C. 342. **X**
- (iii) The true legal representative is bound by an order passed in execution proceedings obtained after notice against the heir-at-law and the residuary legatee under the will of the deceased judgment-debtor. 30 C. 1044 following 14 M. 454. **Y**
- (iv) A residuary legatee who is in possession of the estate of a deceased judgment-debtor, testator, and who subsequently obtains letters of administration is not an executor *de son tort*, whose acts would not be binding upon the legal representative. 30 C. 1044, referring to 17 M. 786. **Z**
- (v) Where a will has been left by a deceased Hindu, but probate has not been taken out, the person who takes possession of the estate of the deceased, pending issue of probate, must be treated for some purposes as his representative, and a judgment obtained against such a representative is not a mere nullity. 8 C.W.N. 842 (851). **A**

(9) Court should not in *bona fide* applications for probate (or letters of administration) consider questions of title or disposing power.

- (i) The grant of probate to the executor does not confer upon him any title to property which the testator had no right to dispose of. It only perfects the representative title of the executor to the property, which did belong to the testator, and over which he had a disposing power. So, upon a *bona fide* application for probate of a will, it is not the province of the Court to which the application is made to go into questions of title with reference to the property of which the will purports to dispose. The grant of probate does not prejudice the rights of any person who claims any such property. 4 C. 1=2 C.L.R. 422. **B**
- (ii) It would lead to the greatest confusion if the validity of the will could be questioned in the civil suit after the grant of probate. There might be any number of conflicting decisions as to the validity of the will. The executor would be exposed to endless litigation, and he would never be safe in dealing with the property of deceased. 4 C. 360 (363) following, 2 N.W.P. 268 (274). **C**
- (iii) In a proceeding upon an application for probate of a will, the only question which the Court is called upon to determine, is whether the will is true or not, and it is not the province of the Court to determine any question of title to the property covered by the will. 20 C. 888 (894-895). **D**

Miscellaneous—(Continued).

- (iv) Probate is only conclusive as to the appointment of executors and the validity and contents of the will. In an application for probate it is not the province of the Courts to go into the question of title with reference to the property of which the will purports to dispose, or the validity of such disposition. 12 B. 164, *following*, 4 C. 1. See, also, 6 C. 460 (462). E
- (v) A Court cannot refuse to grant probate of a will because the testator had no power to dispose of some or even all of the property he purported to deal with. 18 B. 749. F
- (vi) The grant of probate is decisive only of the genuineness of the will propounded and of the right of the executors thereby appointed to represent the estate of the testator. It in no respect decides any question as to the disposing power of the testator, or as to the existence of any disposable property. 26 B. 792 (796). G
- (vii) In an application for probate, the High Court in the exercise of its testamentary and intestate jurisdiction, will not enter on a question of title to the property, which the testator purports to leave. And the reasons operating to limit the scope of the enquiry when a probate is sought, are equally applicable to a petition for letters of administration. 6 Bom. L.R. 966 = 28 B. 644. H
- (viii) Where an application for probate of a will is contested, and it is alleged that the property dealt with by the will was not the testator's or was not property over which he had a power of testamentary disposal, it is not the duty of the Court to try an issue raising this question. 19 A. 458 (460), *referring to Thorpe v. Macdonald*, 3 P.D. 76; 6 C.L.R. 176; 4 C. 1; 12 B. 164; 20 C. 888; 18 B. 749. I
- (ix) It is not the practice of the Court in its Testamentary and Intestate jurisdiction to go into the question of title, or whether the property left by a deceased member of a Mitakshara family was separate or joint. 3 C.W.N. cclxxvii. J
- (x) So, if there is allegation by the widow of a deceased member of a Hindu governed by the Mitakshara that there was separate property, it is sufficient to entitle her to letters of administration in preference to a brother of the deceased alleged to be joint with him. 3 C.W.N. cclxxvii. K
- (xi) In proceedings relating to grant of letters of administration, the Court has no jurisdiction to decide what property belongs to the estate of the deceased. 6 Ind. Cas. 650. L

(10) Letters of Administration, whether sufficient to prove disputed will.

Letters of administration with copy of the will annexed may be equivalent to probate, but neither is of itself sufficient to prove a will, the genuineness of which is contested. 8 W.R. 308. M

(11) A grant of probate (or letters of administration) supersedes a prior grant of succession certificate.

A grant of probate (or letters of administration) in respect of any estate, supersedes any certificate previously granted under the Succession Certificate Act, (VII of 1889), in respect of any debts or securities included in the estate. See S. 21, Act VII of 1889. N

Miscellaneous—(Continued).

- (12) **How far original will may be referred to, for correcting inaccuracies in the probate.**

The original will may be looked at, to assist the construction, but not to alter or vary or displace anything determined in the granting of the probate which must be done only by an application to rectify the probate. I Will. Exors., 10th Ed., 448. O

- (13) **Judge incompetent to refuse probate to executor named in will.**

As to this, see notes under S. 6, *supra*. P

- (14) **Rule as to proving fraud inapplicable to probate cases.**

The rule, that fraud can only be proved by an innocent party, is not applicable to probate cases. *Birch v. Birch*, (1902), p. 130. Q

- (15) **Powers regarding grant of probate by Moulmien Recorder's Court.**

(a) The Recorder's Court has the same powers in respect to grant of probate to the estates of Natives as the High Court before and after the passing of the Indian Succession Act, *i.e.*, it cannot grant probate of the will of a Hindu in any case in which, according to the Hindu Law of Inheritance and Succession, the testator had no power to make a will, and in dealing with the will, after probate has been granted, the Court cannot give effect to it so far as it is contrary to the Hindu Law of Inheritance. 11 W.R. 413. R

(b) It is a question whether the Recorder's Court has power to grant letters of administration, or such letters with a will annexed, to the estates and effects of a native of British India; but, in all cases, it must be guided in granting them by the law of inheritance or succession of such native, and it cannot grant administration to the estate of a Hindu, Mahomedan or Buddhist which would interfere with such law. *Ibid*. S

- (16) **A Hindu executor can make a valid transfer of the estate to the Administrator-General under S. 31 of Act II of 1874.**

The right to devolve the property of a deceased testator, with all powers and duties relating to the management and administration conferred by S. 31 of the Administrator-General's Act, II of 1874, not being confined to any particular class of executors or of estates, a Hindu executor after the passing of the Hindu Wills Act, may effect a valid transfer of the estate under S. 31 of the above Act. 22 C. 738 (P.C.)=22 I.A. 107. T

- (17) **In suits between a beneficiary of the property vested in an executor and a third person the executor is not a necessary party.**

In the case of suits concerning property vested in an executor or administrator where the contention is between the persons beneficially interested in such property and a third person, it is not necessary to make such executor or administrator a party, unless the Court orders otherwise. C.P.C., Act V of 1908, O. 31, r. 1. U

A.—Cases under S. 187 of the Succession Act.

- (1) **No section in the Probate Act corresponding to S. 187 of the Succession Act.**

There is no section in the Probate Act corresponding to S. 187 of the Succession Act which enacts that no right as executor or legatee can be established in a Court of Justice, unless a grant of probate or letters of administration had been obtained from a competent Court. See S. 187, Act X of 1865. Y

Miscellaneous—(Continued).

(2) Effect of incorporation of S. 187 in the Hindu Wills Act.

S. 190 has been omitted from the Probate and Administration Act; but S. 187 though not incorporated in that Act, has been retained in the Hindu Wills Act. The result, therefore, is that an executor or administrator cannot establish his right under the will unless probate or administration has been granted. 30 C. 1044 (1056). **W**

(3) S. 187 of the Succession Act is not applicable to wills not governed by the Hindu Wills Act.

(a) In the case of such wills, the right as executor or legatee can be established by proof of the will. Ph. and Trev. 341. **X**

(b) The effect of the inclusion of S. 187 in the Hindu Wills Act and the exclusion of S. 187 from the Probate and Administration Act, is that in case of Hindu Wills falling within the Hindu Wills Act, probate is necessary; and that except in such cases, an executor of any Hindu or Mahomedan will may establish his right in a Court of Justice without taking out Probate. 8 B. 241. **Y**

(c) *Semle*.—S. 187 not being made applicable to Hindu Wills made before 1870, it is not obligatory on executors or legatees under them to take out probate or letters of administration in order to establish their rights in a Court of Justice. 14 C. 37. **Z**

(d) With regard to Wills of Hindus antecedent to 1870 when the Hindu Wills Act was passed, although it is competent to a Court to grant probate or letters of administration, still, it is not obligatory on executors or persons claiming probate or administration to obtain such probate or letters of administration before they can establish their right in respect to any property subject to such wills. 17 C. 272, *following* 14 C. 37. **A**

(e) Except where the Hindu Wills Act 1870 is in force, it is not obligatory on a person claiming under the will of a Hindu to obtain probate of the will before instituting his claim. 18 A. 260, *following* 17 C. 272; 1895 A.W.N. 87. **B**

(f) A legatee is entitled to sue an executor for a legacy bequeathed to him by a Hindu testator in the mofussil. 26 B. 301. **C**

(4) Whether the section applies both to plaintiffs and defendants.

(a) S. 187 of the Indian Succession Act applies to plaintiffs and defendants. 6 M.L.T. 116. *But see infra*. **D**

(b) S. 187 of the Succession Act does not debar a defendant from relying on a will, in respect of which no probate or letters of administration have been taken out, when he is not seeking to establish a right as executor or legatee. 3 Ind. Cas. 475=33 M. 91 *following* 14 M. 454. **E**

(5) The rule in section 187 applies to persons claiming under executors and legatees.

The words "no right as executor or legatee," include a person claiming under the executor or legatee. See 15 B. 657; Ph. and Trev. 340. **F**

(6) "Legatee" includes devisee.

"Legatee" in the section includes a devisee of land. See 22 W.R. 174. **G**

Miscellaneous—(Continued).

- (7) A will without probate may be used for purposes other than establishing right as executor or legatee.

(a) Though an executor can establish no right without taking probate, the existence of the will cannot be ignored for all purposes whatsoever. 14 M. 454. H

(b) Where a Hindu who was a defendant in a suit died leaving a will, and his executors did not apply for probate of the will, and the divided brothers of the deceased took possession of his property, and being brought on the record as the representatives of the deceased, a decree was passed by consent; and the mother of the deceased, who, apart from the will, would have been his legal representative, now sued to have the decree set aside, it was *held* that she could not maintain the suit as there was a will of which she was not the executrix. 14 M. 454. I

(c) Where the executor renounced and no probate of the will or letters of administration were granted, in a suit by the testator's sole heiress for construction of the will and for administration, the Court allowed the execution of the will to be proved in Court and directed the usual administration accounts to be taken. 4 C. 508. J

- (8) In the absence of probate or letters of administration, the suit must be dismissed.

Where the first Court decreed a suit for possession of land claimed under a will, the lower appellate Court was held to have rightly dismissed the suit on the ground that the plaintiff had not taken out probate under S. 187. 22 W.R. 174. K

- (9) Illustrative cases.

(i) For a case in which S. 187 was applied to a suit by a legatee to recover his legacy, see 26 B. 449. L

(ii) On a claim by the son of a deceased person to recover property belonging to the deceased, where the defendant set up a sale of the property by the legatee to whom the property was given under the will of the deceased, it was *held* that S. 187 debarred the Court from giving effect to the defendant's claim as no probate of the will had been taken out. 11 C.W.N. lxxvi. M

(iii) No suit is maintainable by a person in his capacity as the administrator of the estate of a deceased person unless and until letters of administration are issued to him to entitle him so to sue in such representative capacity. 12 C.W.N. 738. N

- (10) "Probate" referred to in the section, meaning.

The probate intended by S. 187 is a copy of the will certified and sealed by a Court of competent jurisdiction, as defined in S. 3, and it may be taken out by a legatee. 22 W.R. 174. O

- (11) Production of letters of administration by the residuary legatee satisfies the section.

Reading Ss. 187, 196 and the definition of "probate" in S. 3 together, a residuary legatee claiming under the will of a Hindu resident of Bombay, can, notwithstanding the terms of S. 181, obtain a grant of administration with the will annexed that will satisfy the requirements of S. 187, and until he does so, he is not entitled to establish his claim. 3 Bom. L.R. 874 = 26 B. 267, *following* 22 W.R. 174. P

Miscellaneous—(Continued).

(12) Proof by one legatee satisfies the section and entitles other legatees to relief.

(a) The main object which S. 187 has in view is, that any will upon which a claim is founded must be formally proved in a Court of Judicature, and that unless probate or letters of administration in respect of such will has been obtained, the claim should not be allowed to be enforced. So, if a will is once proved and probate or letters of administration are granted to one legatee, any other legatee may come in, and would be entitled to obtain relief from the Court. S. 187 would not be a bar. 4 C.L.J. 523 = 10 C.W.N. 864. Q

(b) So, when a District Judge granted letters of administration in respect of the entire estate to legatee, and the High Court on appeal held, that the will was genuine, but the grant ought to be a limited one, and the original grant was not really cancelled, as the grantee died and could not deliver up the letters for cancellation, held that another legatee need not apply for fresh grant of letters of administration before obtaining relief from the Court. 4 C.L.J. 523 = 10 C.W.N. 864. R

(13) Maintainability of suit by beneficiary under secret trust, how affected by the section.

(a) Where the beneficiary entitled under a secret trust communicated to and accepted by the legatee claims such benefit, he claims through the legatee named in the will; and as no right as legatee can be established without a grant of probate or letters of administration under S. 187, the beneficiary cannot maintain a suit to recover the benefit intended for him when there is no grant of probate or letters of administration. 31 M. 187, *Per Wallis, J.* But see, *contra*, next note. S

(b) S. 187 is no bar to such suit, as the beneficiary does not sue to establish any claim as legatee, but to enforce the trust imposed on the legatee, so far as he is concerned. The suit is to enforce an *obligation* against the legatee, and not to establish any right of the legatee as such. And the legatee in possession of a substantial portion of the property is an *executor de son tort* with all the liabilities of an executor and an universal legatee, and he cannot plead want of probate or letters of administration. *Per Sankaran Nair, J.* in 31 M. 187. T

(14) Right as guardian created by will, can be established without probate.

It is not incumbent on a person, who has been appointed guardian of a minor under a will, to take out probate as a condition precedent to his obtaining a certificate of guardianship under the Guardian and Wards Act VIII of 1890. 19 B. 832. U

(15) The grant of a certificate under Act XXVII of 1860 does not establish a right as executor or legatee within the section.

The grant of a certificate under Act XXVII of 1860 on the title afforded by a will, which gives the grantee the estate in respect of which the debts accrued, does not establish a right as executor or legatee within the meaning of S. 187. 23 W.R. 252. Y

Miscellaneous—(Continued).

B.—Cases under S. 4 of the Succession Certificate Act VII of 1889.

- (1) Grant of probate or letters of administration and grant of succession certificate, compared in effect.

"The grant of probate or letters of administration establishes the general representative character of the grantee, whereas the Succession Certificate Act limits the power of the certificate-holder, as regards the collection of debts and securities of the deceased person, to those debts and securities only which are specified in the certificate. Besides, the representative character of a certificate-holder is not conclusive, being liable to be set aside by a regular suit." Speech of Mr. Evans on the passing of the Succession Certificate Act. See Gazette of India, 22nd October, 1881, Part I, p. 504. See, also, S. 21, Act VII of 1889. **W**

- (2) Enough if certificate produced during pendency of proceedings.

It is enough if the succession certificate is supplied during the pendency of the proceedings. 19 C. 492 (485); 23 C. 87 (111) (F.B.). **X**

- (3) Certificate cannot be refused because the applicant could have asked for probate.

On an application for a succession certificate made by a person appointed trustee under the will of the deceased to collect his debts, it was held that the Judge could not refuse the certificate simply because the applicant might have asked for probate, as the case did not fall under cl. (4) of S. 1 of Act VII of 1889. 16 B. 712. **Y**

- (4) Section does not preclude an applicant from obtaining a certificate under the will.

S. 1, cl. (4), of the Succession Certificate Act, VII of 1889 does not preclude an applicant from obtaining a certificate under the will of the deceased. 18 B. 608. **Z**

- (5) Decree with condition not to execute it until production of certificate is bad.

A Court would be wrong in making a decree coupled with a condition that it shall not be executed without the production of a succession certificate. 13 C. 47 (49). **A**

- (6) An executor can prove that a certificate was obtained by fraud.

An executor is not disabled from proving that the succession certificate obtained by a third party to recover a debt due by the deceased, was obtained by fraud. 19 B. 821. **B**

- (7) Certificate necessary where there is doubt as to the party entitled to the debt.

Where payment of a debt is withheld from a reasonable doubt as to the party entitled to it, the person desirous of recovering it is bound to produce a certificate under Act XXVII of 1860 before decree or execution issues. 13 C. 47. **C**

- (8) Section applies to representative of assignee by devise of a debt.

The representative of an assignee by devise of a debt cannot sue to recover the debt without having either taken out probate of the will of the testator, or having obtained a certificate under Act XXVII of 1860 to realise the debts belonging to his estate. 4 C. 645. **D**

Miscellaneous—(Continued).

- (9) Section not applicable to claims against executors or trustees or to claims for immoveable property.

—: See 2 C. 45 (54).

E

- (10) Section not applicable to debts falling due after death.

An heir may sue without a certificate for debts falling due after the death of the deceased. 2 C.W.N. 591.

F

- (11) Section not applicable to suit for a share of a deceased partner.

Where a Mahomedan, being the son of a deceased member of a firm, sued the surviving partners for an account of the share of the deceased partner, and had neither letters of administration nor a succession certificate, *held* that the plaintiff's claim being unliquidated was not a debt within S. 4 (1) (a) of Act VII of 1889. 22 M. 139.

G

- (12) Section not applicable to a suit for foreclosure.

The section is not applicable to a mortgagee's suit for foreclosure. 16 M. 64 ; 16 A. 259 (207).

H

- (13) Section whether applicable to suits for sale of mortgaged property under S. 88 of the Transfer of Property Act.

(i) The assignee of a property mortgaged is not a debtor within S. 4, Act VII of 1889, and a mortgagee paying for the sale of the property and asking for no relief against the mortgagor personally, is not bound to take out a certificate under that Act before he can obtain a decree. 19 C. 336, *followed* in 22 C. 143 ; 26 C. 839.

I

(ii) S. 4 of Act VII of 1889 applies to suits for sale under S. 88 of the Transfer of Property Act. 16 A. 259 ; *dissented from* in 26 C. 839 = 4 C.W.N. 558 and in 28 B. 630, *infra*.

J

(iii) S. 4 of the Succession Certificate Act, VII of 1889, limits the necessity of a certificate under the Act to those suits in which the Court is called upon to pass a personal decree against a debtor of a deceased person for payment of his debt ; and does not apply to a suit for sale on a mortgage. 28 B. 630 ; *following* 19 C. 336 ; 22 C. 143 ; 26 C. 839 ; and *dissenting from* 16 A. 259 ; see, also, 12 C.W.N. 145 (149).K

- (14) Section not applicable where creditor dies during execution proceedings.

S. 4 of the Succession Certificate Act, VII of 1889, is not a bar to execution proceedings instituted on a mortgaged decree upon the application of the original mortgagee, by reason of the original mortgagee having died during the pendency of the proceedings, and his legal representatives substituted in his place not having produced any succession certificate. 26 C. 839 = 4 C.W.N. 558.

L

- (15) Certificate not necessary to establish right under a will.

A plaintiff can sue to establish his right under a will without producing a certificate under Reg. VIII of 1927. 19 B. 320.

M

- (16) Certificate not necessary for a suit for damages.

A succession certificate is not necessary for a suit to recover damages for wrongfully receiving a *deshmukhi hak* after its sale. 15 B. 580.

N

Miscellaneous—(Concluded).

(17) Certificate not necessary for recovering debt due to a joint family.

- (a) On an application for execution of a decree obtained by the deceased, made by his surviving undivided brother, it was held that if the debt was a family debt, no certificate under S. 4 of Act VII of 1889 was necessary; but if the debt was part of the separate property of the deceased, the applicant having to execute the decree as heir and not as survivor, must obtain a certificate to enable him to proceed. 16 B. 849. **O**
- (b) A Hindu is not entitled to sue on a bond executed in favour of his undivided father, deceased, without the production of a certificate under Act VII of 1889, unless it appears on the face of the bond that the debt claimed was due to the joint family consisting of the father and the son. 14 M. 377; see 20 M. 232, *cited infra*. **P**
- (c) In such a case it is not necessary that the debt should appear a joint debt on the face of the document, but it is enough if it can be proved otherwise. 20 M. 232. **Q**
- (d) Where a plaintiff claimed by right of survivorship to recover money due on a mortgage bond executed by the defendants in favour of the former managing member of the plaintiff's undivided family, *held* that plaintiff need not produce a succession certificate. 22 M. 380 *following* 20 M. 232. **R**
- (e) See, also, 23 C. 912, and 1 C.W.N. 32. **S**

(18) Certificate not necessary for a widow suing as trustee of endowment founded by husband, and not as representing his estate.

In a suit brought by a widow who had succeeded to her husband as trustee of an endowment for a debt due thereto, *held* that as she was not suing as being entitled to the effects of her deceased husband or for payment of a debt due to the estate which had been his, neither S. 2, Act XXVII of 1860, nor S. 4, Act VII of 1889, was applicable to her claim, and that her not having obtained a certificate of heirship to her husband's estate did not disentitle her to a decree. 20 M. 162 (P.C.)=1 C.W.N. 497=24 I.A. 73. **T**

13. Letters of administration cannot be granted to any person who is a minor or is of unsound mind. [S. 189].

To whom administration may not be granted ¹.

(Notes).

General.

Corresponding Indian Law.

- (a) This section corresponds to S. 189 of the Indian Succession Act, X of 1965, but omits the words "nor to a married woman without the previous consent of her husband" at the end of the section. **U**
- (b) The words relating to the married woman have been omitted in the Probate and Administration Act, because, as the Select Committee say in their Report on that Act, the imposition of such a condition would be inconsistent with the proprietary status accorded to married woman among a large proportion of the persons for whom the Act is intended, and would confer a power on the husband, which would, in many cases, be likely to be abused. *Hend. 8rd. Ed., 254.* **Y**

I.—“To whom administration may not be granted.”

(1) Who are capable of being administrators.

All persons who are qualified to act as executors are also qualified to act as administrators, with this exception that as an administrator is required to give a bond, as security for the due performance of his office, it follows that all persons who are unable to execute such a bond are in fact disqualified. Majumdar, 473, *citing* Brown's Probate Practice, 1881, Ed., 159. W

(2) Who are incapable of being administrators.

The incapacities of executors apply to administrators as well, with bankruptcy in addition to them. I Will. Exors., 10 Ed., 359, *citing* Hills v. Mills, 1 Salk. 36. X

(3) Minor, definition.

As to this, see S. 3, *supra*. Y

(4) The period of minority fixed in the Act applies to all persons whether domiciled in British India or not.

As to this, see notes under S. 183, *supra*. Z

) Person of unsound mind.

As to this, see notes under S. 8, *supra*. A

(6) When person entitled to administration is a lunatic—Procedure.

When a lunatic is the sole executor, or sole universal or residuary legatee, or person entitled to letters of administration, see S. 33, *infra*. B

(7) When administrator becomes lunatic—Procedure.

Where a person appointed executor or granted letters of administration, becomes *non compos*, the Court may grant administration to another. *Evans v. Tyler*, 2 Rob. 128, *cited* in Hend, 3rd, Ed., 261. C

91]. Effect of letters of administration 1. 14. Letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death.

(Notes).

General.]

(1) Corresponding Indian Law.

This section corresponds to S. 191 of the Indian Succession Act, X of 1865. D

2) Section applicable to administration with the will annexed.

Although S. 14 does not mention administration with the will annexed, the section is apparently applicable. Ph and Trev, 358, Hend. 3rd Ed., 263. E

I.—“Effect of letters of administration.”

(1) Effect of grant of letters of administration.

When letters have been granted, the administrator is entitled to all the rights which the intestate had at the time of his death vested in him, although no right of action accrues to the administrator until he has obtained letters. *Pratt v. Swaine*, 8 Barn. and Cres. 287; cited in Hend. 3rd Ed., 264. F

(2) Title of administrator relates back to death for purposes of recovery against the wrong-doer.

The title of an administrator, though it does not exist until the grant of administration, relates back to the time of the death of the intestate, so that he may recover against the wrong-doer who has seized or converted the goods of the intestate in an action of trespass or trover. *Thorpe v. Stallwood*, 5 M. & G. 760; *Foster v. Bates*, 12 M. & W. 233; cited in Hend. 3rd Ed., 264. G

(3) Right of Administrator-General to a grant of administration.

As to—, see Ss. 16 and 17 of the Administrator-General's Act, II of 1874. H

(4) Grant of certificates by the Administrator-General.

For—, see Ss. 36 and 37 of the Administrator-General's Act, II of 1874. I

(5) Right of administrator to transfer estate to the Administrator-General.

As to this, see S. 31 of Act II of 1874. J

(6) How far letters of administration validate intermediate acts of the administrator.

As to—, see S. 15, *infra*. K

(7) Except under special circumstances, general letters of administration should be taken out.

(a) If Hindus take out letters of administration at all, they must take out general letters. Letters of administration limited to certain property cannot be granted. 5 C. 2=4 C.L.R. 290. L

(b) Except under special circumstances, letters of administration to the estate of a deceased Hindu must be taken out in respect of the immovable as well as the moveable property forming part of such estate. 6 C. 483. M

(c) Letters of administration limited to the Government securities and cash alone of a deceased Hindu's estate were directed to issue, in view of the special circumstances of the case, taking it out of the operation of the rule in 5 C. 2. 10 C. 554. N

(8) In an application for letters of administration, the title to the property will not be determined.

(a) In an application for letters of administration it was held on the evidence that the deceased left property to which administration could be granted without finally determining the title to such property. 21 C. 344. O

(b) See, also, notes under S. 12, *supra*. P

1.—“Effect of letters of administration”—(Concluded).**Cases under S. 190 of the Succession Act.****(1) No section in the Probate Act corresponding to S. 190 of the Succession Act.**

There is no section in the Probate Act corresponding to S. 190 of the Succession Act which enacts that no right to any part of the property of a person who has died intestate can be established in a Court of Justice unless letters of administration have first been granted by a competent Court.
See S. 190, Act X of 1865. Q

(2) It is not obligatory on a Hindu heir to obtain letters of administration to the estate of the last owner.

It is not obligatory on a Hindu heir to obtain letters of administration to the estate of the last owner. 13 C.W.N. 1190. R

(3) In cases governed by the Succession Act, a decree obtained against an heir in possession before the grant of administration is not valid and binding on the estate.

(i) A decree obtained against an heir of a deceased intestate in possession of part of the estate of the deceased is not valid, as such heir does not legally represent the estate of the deceased, having regard to Ss. 190 and 191 of the Succession Act. 4 A. 192=2 A.W.N. 3. S

(ii) Where a Parsi died intestate leaving two sons and a widow and daughters, and the sons assumed the management of the estate without taking out letters of administration, and the widow and daughters obtained letters of administration limited to the extent of their interest in the estate, and one of the sons sued the other son and the other members of the family to recover out of the estate a sum of money advanced by him to the deceased, *held* that the estate being unrepresented, the suit could not be maintained by virtue of S. 190 of the Succession Act; and that the letters obtained by the widow and daughter being limited, were not such letters as were contemplated by S. 190. 18 B. 337. T

(4) Where there is no question of administration, S. 190 is no bar to a suit.

Where a Parsi died intestate, and his brother, without taking out letters of administration, sold the deceased's land to plaintiff who now sued for a declaration that defendant had no right of way over such land as claimed by him, *held*, that defendant could not plead want of letters of administration under S. 190 which did not apply to the case, as there was no question of administration involved in the case. 19 B. 828. U

15. Letters of administration do not render
 Acts not validated by administration¹. **valid any intermediate acts of the administrator tending to the diminution or damage of the intestate's estate.**

(Notes).**General.****Corresponding Indian Law.**

This section corresponds to S. 192 of the Indian Succession Act, X of 1865, **V**

1.—“Acts not validated by administration.”

(1) Acts which an administrator cannot do before grant of letters.

As an administrator derives his appointment from the Court, he cannot as a general rule, before the grant of letters, do anything as administrator:—(I Will. Exors., 10th Ed., 314-5).

- (i) He cannot release an action. *Middleton's case*, 5 Co. 28 (a).
- (ii) He cannot release a debt. *Barefoot v. Barefoot*, Palm, 511.
- (iii) He cannot assign the deceased's property. 2 Preton. Abst. 146.
- (iv) He cannot bring an action. *Wankford v. Wankford*, 1 Salk. 301.
- (v) He cannot surrender a lease. *Deo v. Glinn*, 1 Ad. & E. 49.
- (vi) He cannot effect a mortgage. *Mitters v. Brown*, 1 H. & C. 686.
- (vii) He cannot give a valid notice. *Holland v. Holland*, 6 C.B. 727. **W**

(2) But acts done, though before grant of letters, if for the benefit of the estate, are valid.

But, in some cases acts though done before the grant of administration, being done for the benefit of the estate, have been held valid. I Will. Exors., 10th Ed., 316-7. **X**

16. When a person appointed an executor has not renounced [S. 193.] the executorship, letters of administration shall not be granted to any other person until a citation has been issued calling upon the executor to accept or renounce his executorship;

Grant of administration where executor has not renounced 1.

except that, when one or more of several executors has or have proved a will, the Court may, on the death of the survivor of those who have proved, grant letters of administration without citing those who have not proved.

Exception 2.

(Notes).

General.

(1) Corresponding Indian law.

This section corresponds to S. 193 of the Indian Succession Act, X of 1865. **Y**

(2) Ss. 16 to 22 contemplate only cases of letters of administration with the will annexed.

Ss. 16 to 22 both inclusive contemplate cases where the deceased has left a will, and, therefore letters of administration contemplated by them are letters of administration *cum testamento annexo*. Majumdar. **Z**

1.—“Grant of administration where executor has not renounced.”

(1) Citation, meaning.

‘Citation’ is a summons to appear, and the word is applied particularly to processes in the Probate Courts. Wharton cited in Majumdar. 477. **A**

(2) Purpose of citation.

As to this, see notes under S. 69, *infra*. **B**

1.—“Grant of administration where executor has not renounced”—(Old.).

(3) Effect of absence of citation upon executor.

(a) The absence of citation upon the executor would constitute good cause for the revocation of the letters of administration. 12 B. 164. **C**

(b) See, also, notes under S. 50, *infra*; and Trist. and Coote, 13th Ed. 231. **D**

(4) Effect of intermeddling.

In England it has been held that an executor who intermeddles may be compelled to take probate, though an administrator under similar circumstances cannot be compelled to take letters of administration. *In bonis* Fell, 2 Sw. & Tr. 126, *Mordaunt v. Clarke*, 1 P. & M. 592 cited in Trist. & Coote, 13th Ed., 238, 224. **E**

(5) “Intermeddling,” what constitutes.

As to this, case notes under the heading of “Executor *de son tort*” in S. 3. *supra*. **F**

(6) Can the Court compel an executor to take out probate in any case?

(a) For a case in which an executor who had acted as such without obtaining probate was required to lodge the will in Court and obtained probate, see 20 B. 227; citing *Pyatt v. Pendall*, 1 Cr. Temp. Lcc. 553; *Long v. Symes*, 3 Hagg. 774; *Mordaunt v. Clarke*, 1 P. & M. 592. **G**

(b) Messrs. Philip and Trevelyan criticise the order in 20 B. 227 saying that it should not have gone further than requiring the executor to accept or renounce within a reasonable time. Ph. and Trev. 358. **H**

(c) An executor cannot be compelled to accept the office, but will be cited to take or refuse probate. 1 Will. Exors., 10th Ed., 197. **I**

(d) It is doubtful whether the Court can in any case compel an executor to take out probate. Ph. and Trev. 358. **J**

(7) Grant may be made to Administrator-General, if executor takes no steps for one month.

Under S. 16 of the Administrator-General's Act, II of 1874, if the executor does not take steps to administer within one month of the death, the Administrator-General is entitled to a grant without citation issuing to the executor. Hend. 3rd Ed., 265. **K**

2.—“Exception.”

Citation on renouncing executor not necessary on death of one who has proved.

Where one or more executors had renounced, it is not necessary, on the death of the survivor of those executors who had proved the will, to issue citations to those who had renounced. *Harrison v. Harrison*, 1 Rob. 406; *Venables v. E.I.Co.*, 2 Exch. 638, cited in Hend. 3rd Ed., 265. **L**

17. The renunciation may be made orally in the presence of the Judge, or by a writing signed by the person renouncing, and when made shall preclude him from ever thereafter applying for probate of the will appointing him executor.

Form and effect of renunciation of executorship ¹.

(Notes).

General.

(1) Corresponding Indian Law.

This section corresponds to S. 194 of the Indian Succession Act, X of 1865. M

(2) S. 17 is based on English Law as to effect of renunciation.

S. 17 is based upon S. 79 of the English St. 20 & 21, Vict., C. 77 as amended by S. 16 of St. 21 & 22, Vict., C. 95, which enacts that the rights of an executor, on his renouncing probate, should cease, and the representation of the testator should go as if he had not been named; see *In re Gill*, 3 P. & D. 113; *Hend.*, 3rd Ed., 265; *Trist. & Coote*, 13th Ed., 226. N

I.—“Form and effect of renunciation of executorship.”

(1) Mere consent is not renunciation.

Before a grant can be made to another, the executor must renounce; and his mere consent is not sufficient. *Garrard v. Garrard*, 2 P. and D. 238. O

(2) Renunciation cannot be in part.

An executor cannot renounce in part. He must refuse entirely or not at all. *Paule v. Moodie*, 2 Roll. Rep. 132. P

(3) A renunciation till formally made, can be retracted.

Where the Official Trustee expressed his intention of renouncing probate, but subsequently retracted, *held* that no formal renunciation having been made, he was not precluded from obtaining for probate. 35 C. 156, following *In the goods of Robert Morant*, 3 P. and D. 151. See, also, *Trist. and Coote*, 13th Ed., 227. Q

(4) Renunciation must be recorded in Court.

The refusal of the executor must be recorded in Court before the grant is made to any other person. *Long v. Symes*, 3 Hagg. 776. R

(5) A renunciation till recorded, can be retracted.

(a) An executor cannot renounce after he has taken probate, but until his refusal is recorded and filed, it can be withdrawn. *In the goods of Veiga*, 32 L.J.P.M. and A. 9; *In the goods of Morant*, 3 P. and D. 151. See, also, *Trist. and Coote*, 13th Ed., 228. S

(b) An executor who has renounced may, before it has been recorded and actual grant made to any other party, ask the Court that the renunciation be not given effect to, and probate granted to him. 5 C. W.N. clv. T

(6) Executor who has acted as such cannot renounce so as to void liabilities attaching to the office.

An executor once having acted unquestionably as an executor cannot renounce that character and all the liabilities which attach to it, and having once acted, the subsequent renunciation is void, and he continues liable to be sued in the character of an executor. 32 B. 364=10 Bom. L.R. 117, following *Rogers v. Frank*, 1 Y. & J. 409. U

(7) Renouncing executor may sue his co-executor.

An executor who renounces may sue his co-executor. *Dorchester v. Webb*, Sir W. Jones 345; *Rawlinson v. Shaw*, 3 T.R. 557. Y

I.—“Form and effect of renunciation of executorship”—(Concluded).

- (9) **Executor who has not proved may sue his co-executor who has proved for inventory and account.**

As to this, see notes under S. 9, *supra*.

W

- (9) **Executor renouncing as such cannot take administration in another character.**

(a) No person who renounces probate of a will is allowed to take a representation to the same deceased in another character. *Trist. & Coote*, 13th Ed., 225.

X

(b) But under S. 41, *infra*, the Court can grant letters of administration *de bonis non* to an executor who had renounced, on the death of a residuary legatee before fully administering the estate under letters of administration granted to him. 3 C.W.N. cccxxviii.

Y

(c) An executor who has renounced, for himself as such, may take administration as the attorney of his co-executors. *In bonis* Russell, 1 P. & M. 694, cited in *Trist. & Coote*, 13th Ed., 225.

Z

- (10) **Renouncing executor cannot exercise a power given to executors as such.**

Where a power is given to executors, in that character, they cannot exercise it if they renounce, but those who act can exercise the power. *Hend.*, 3rd Ed., 266 and see cases therein cited.

A

- (11) **Executor cannot bind himself by agreement to renounce.**

An executor cannot bind himself to renounce by agreement, and the Court will not enforce such an agreement. *Hargreaves v. Wood*, 2 Sw. & Tr. 604.

B

- (12) **Executor cannot assign his appointment.**

(a) An executor cannot assign his appointment. *Doyle v. Blake*, 2 Sch. & L. 239.

C

(b) But see S. 31 of the Administrator-General's Act, II of 1874.

D

- (13) **When the Court can discharge an executor who has proved, and the effect of such discharge.**

The Court has power to discharge an executor on his application, if he has done substantially all that is required to be done by an executor in the administration of the estate, and if a proper case is otherwise made out. But, an executor so discharged remains liable for anything he has done or left undone while an executor, for, the Court can only relieve him from the duties of his office from the date of the discharge. 20 B. 188.

E

- (14) **Renunciation by executor binds his representatives.**

The renunciation of executorship, which is an office, binds the representatives of the executor. *In the goods of J. Perry*, 2 Curt. 655, cited in *Trist. & Coote*, 13th Ed., 222.

F

- (15) **Renunciation may be by attorney.**

Renunciation may be made by an attorney authorised by a power given to that effect. *Re Rosser*, 3 Sw. & Tr. 492, cited in *Trist. & Coote*, 13th Ed., 223.

G

- (16) **Non-appearance to citation equivalent to renunciation.**

The non-appearance to a citation of a party having a superior interest, if he has been served with such process, has the same effect as a renunciation. *Trist. & Coote*, 13th Ed., 226.

H

18. If the executor renounce, or fail to accept, the executorship within the time limited for the acceptance or refusal thereof, the will may be proved and letters of administration with a copy of the will annexed may be granted to the person who would be entitled to administration in case of intestacy. [S. 195]

Procedure where executor renounces or fails to accept within time limited¹.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 195 of the Indian Succession Act, X of 1865. I

1.—“*Procedure where executor renounces, or fails to accept within time limited.*”

Applying for succession certificate is not “accepting the executorship.”

Where an executrix after being cited to accept or renounce her executorship, stated that she was administering the estate, but having applied for a certificate under Act VII of 1889 did not take out probate, *held* that this was not such an acceptance as is contemplated by S. 18 of the Probate Act, and that, on the executrix declining to prove the will, the Judge was right in granting letters of administration with the will annexed to the sole residuary legatee. 19 B. 123. J

Grant of administration to universal or residuary legatee¹.

19. When the deceased has made a will, but has not appointed an executor, or [S. 196]

when he has appointed an executor who is legally incapable or refuses to act, or has died before the testator, or before he has proved the will, or

when the executor dies after having proved the will, but before he has administered all the estate of the deceased,

an universal or a residuary legatee may be admitted to prove the will, and letters of administration with the will annexed may be granted to him of the whole estate, or of so much thereof as may be unadministered.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 196 of the Indian Succession Act, X of 1865. K

1.—“Grant of administration to universal or residuary legatee.”

(1) When administration with the will annexed is granted.

- (i) When no executor is appointed.
- (ii) When the person appointed executor refuses to act.
- (iii) Where the person appointed executor dies before the testator.
- (iv) Where the person appointed executor dies after the testator, but before proving the will.
- (v) Where such person is otherwise incapable of acting (lunacy, &c.).
- (vi) Where at time of death, he is absent and does not appear upon citation (See S. 41, *infra*).
- (vii) Where the executor dies (intestate in England), after having proved the will, but before he has completely administered the estate: (In this case, it is called administration *de bonis non*). 1 Will. Exors., 10th Ed., 370; Hend., 3rd Ed., 267. Trist. & Coote, 13th Ed., 54. **L**

(2) ‘May’ in the section is directory and not permissive.

- (a) The word “may” in S. 19 is not permissive, but directory. 12 B.L.R. 423 (428). **M**
- (b) So, where an executor dies before fully administering the estate, as between the residuary legatee and the executor of the deceased executor, the former is the preferential claimant for letters of administration. 12 B.L.R. 423. **N**

(3) Proof of execution of will required before grant of probate or letters of administration.

- (a) Before letters of administration with the will annexed can be granted, there must be strict proof of the execution of the will. 23 M. 345. **O**
- (b) No grant of probate can be made unless the will has been proved in accordance with law, and inasmuch as a grant of probate operates as a judgment *in rem*, the Court must be satisfied that the will has been duly executed and attested. 6 C.L.J. 453 (455). **P**
- (c) As a grant of probate operates as a judgment *in rem*, the Court must be satisfied that the will has been duly executed before the grant is made. 6 Ind. Cas. 912. **Q**

(4) Universal legatee, meaning.

A universal legatee is a person to whom a testamentary disposition is made, giving him the whole of the property which the testator leaves at his decease. Wharton's L. Lexicon. **R**

(5) Universal legatee, entitled not to probate, but only to letters of administration.

As to this, see notes under S. 6, *supra*. **S**

(6) Probate granted to universal legatee is invalid *ab initio*.

As to this, see notes under S. 6, *supra*. **T**

(7) Residuary legatee, how constituted.

Under S. 89 of the Succession Act (which, however, is not incorporated in the Probate and Administration Act), a residuary legatee is constituted by any words that show an intention on the part of the testator that the person designated shall take the surplus or residue of his property. See S. 89, Act X of 1865. **U**

1.—“Grant of administration to universal or residuary legatee”—(Old).

(8) No particular words necessary to constitute a residuary legatee.

(a) No particular mode of expression is necessary to constitute a residuary legatee. It is sufficient, if the intention of the testator be plainly expressed in the will, that the surplus of his estate, after payment of debts and legacies, shall be taken by a person there designated. II Will., Exors., 10th Ed., 1195, *citing Bland v. Lamb*, 2 Jac. & W. 399; *Hearne v. Wiggington*, 6 Madd. 120; *Fleming v. Burrows*, 1 Russ. 276. **Y**

(b) To constitute a residuary gift, the words “rest and residue” are not necessary. A general devise and bequest of the real and personal estate as a mixed fund in one mass will be a residuary gift. *Trewby v. Balls*, 1909, 1 Ch. 791. **W**

(9) When there are several residuary legatees—Procedure.

Where there are several entitled to the residue, administration may be granted to any of them without the consent of or notice to the others. *Taylor v. Shore*, T. Jones, 162, *cited* in I Will. Exors., 10th Ed., 372; *Trist. & Coote*, 13th Ed., 58. **X**

(10) Residuary legatee is preferred to next-of-kin.

A residuary legatee is preferred to the next-of-kin in the grant of administration *cum testamento annexo*; for, he is the next person to the executor in the choice of the testator. *Atkinson v. Barnard*, 2 Phil. 318, *cited* in I Will. Exors., 10th Ed., 371. **Y**

(11) And to all other legatees.

A residuary legatee is entitled to administration in preference to the next-of-kin and to all other legatees and annuitants, even where there is no present prospect of any residue, and though he is a legatee only in trust. I Will. Exors., 10th Ed., 372. **Z**

(12) Letters of administration cannot be granted under this section to a residuary legatee who is an attesting witness.

Where the name of a residuary legatee, *beneficially* interested in the legacy, appears as a witness to the will, even if an extra and unnecessary witness, he forfeits not only his legacy, but also his right to a grant of administration. *Trist. & Coote*, 13th Ed., 57. **A**

20. When a residuary legatee who has a beneficial interest [S. 197].

Right to administration of representative of deceased residuary legatee 1.

survives the testator, but dies before the estate has been fully administered, his representative has the same right to administration with the will annexed as such residuary legatee.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 197 of the Indian Succession Act, X of 1865. **B**

1.—“Right to administration of representative of deceased residuary legatee.”

- (1) **S. 20 is an extension of the rule in S. 19 in favour of the representative of the residuary legatee.**

The rule in S. 19 applies to the representative of a residuary legatee when the latter dies before fully administering the estate. See *Wetdrill v. Wright*, 2 Phil. 243; *Re Thirlwell*, 6 Notes of Cas. 44. C.

- (2) **The section does not apply in the case of a residuary legatee for life.**

The representative of a residuary legatee for life has no interest. *Wetdrill v. Wetdrill*, 2 Phil. 243. D.

- (3) **The section does not apply where the residuary legatee has renounced.**

If the residuary legatee has renounced, administration will not be granted to his representatives. Trist. and Coote, 13th Ed., 59. E.

198].

21. When there is no executor and no residuary legatee or

Grant of administration where no executor, nor residuary legatee, nor representative of such legatee 1.

representative of a residuary legatee, or he declines or is incapable to act, or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased if he had died intestate, or any other legatee having a

beneficial interest, or a creditor, may be admitted to prove the will, and letters of administration may be granted to him or them accordingly.

(Notes).**General.****Corresponding Indian Law.**

This section corresponds to S. 198 of the Indian Succession Act, X of 1865. F.

1.—“Grant of administration where no executor, nor residuary legatee, nor representative of such legatee.”

- (1) **Next-of-kin rank next to the residuary legatee.**

If the residuary legatee declines, administration will be granted to next-of-kin, unless he has no interest, or the estate is insolvent. 1 Will. Exors., 10th Ed., 375. G.

- (2) **After the next-of-kin come ordinary legatees and creditors.**

When the next-of-kin decline to take administration, it may be granted to a legatee or a creditor upon notice to the next-of-kin. 1 Will. Exors., 10th Ed., 375. H.

- (3) **Administrator-General has preference over ordinary legatees and creditors.**

By S. 15 of the Administrator-General's Act, II of 1874, the Administrator-General has a preferential claim to letters of administration over a creditor and a legatee not being a universal legatee. I.

N.B.—See, also, notes under S. 23, *infra*.

22. Letters of administration with the will annexed shall not be granted to any legatee other than an universal or a residuary legatee, until a citation has been issued and published in the manner hereinafter mentioned, calling on the next-of-kin to accept or refuse letters of administration. [S. 199.]

Citation before grant of administration to legatee other than universal or residuary l.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 199 of the Indian Succession Act, X of 1865. J

1.—“Citation before grant of administration to legatee other than universal or residuary.”

(1) Citation, meaning.

As to this, see notes under S. 16, *supra*.

K

(2) Purpose of citation.

As to this, see notes under S. 69, *infra*.

L

(3) Next-of-kin, who are.

(a) Next-of-kin are those that are “next of blood who are not attainted of treason, felony, or have any other lawful disability.” Lord Coke, see, also, *Hensloe's Case*, 9 Co. 89, (b); cited in Will. on Exors., 10th Ed., Vol. I, p. 328. M

(b) The words “next-of-kin” must be taken to mean the nearest blood relations of the *prepositus* in an ascending and descending line. *Hallin v. Foster*, L.R. 3 Ch. 505; *Harris v. Newton*, 46 L.J. Ch. 268; *Elmsley v. Young*, 2 M. and K. 780; *Withy v. Mangles*, 10 Cl. and F. 215. N

(c) See, also, the definition in S. 3 of the Administrator-General's Act, II of 1874. O

(4) To constitute next-of-kin there must be blood relationship.

(a) In order to constitute next-of-kin there must be blood relationship between the two persons. See *Rutland v. Rutland*, 2 P. Wms. 216, cited in Will., on Exors., 10th Ed., Vol. II, p. 1251. P

(b) A mother-in-law or step-mother of an intestate is not of his blood. And so they can claim nothing under the English Statute of Distributions. *Rutland v. Rutland*, 2 P. Wms. 216, cited in Will., on Exors., 10th Ed., Vol. II, p. 1251. Q

(5) “Next-of-kin” does not include relations by affinity.

(a) See *Maitland v. Adair*, 3 Ves. 231; *Harvey v. Harvey*, 5 Beav. 134. See 11 Jarm. 5th Ed., p. 977. R

(b) Thus, a gift to next-of-kin does not include a husband. *Watt v. Watt*, 3 Ves. 244; *Milne v. Gilbert*, 2 D.M. and G. 715; or wife *Nicholls v. Savage*, cit. 18 Ves. 53; *Re Parry*, *Scott v. Leak*, W.N. 1888, p. 179. S

(c) A widow, though she is a person entitled under the English Statute of Distributions is not of kin, and therefore cannot take under the description “next-of-kin by Statute.” *Garrick v. Lord Campden*, 14 Ves. 372. In re *Fitzgerald*, 58 L.J. Ch. 662. T

1.—“ Citation before grant of administration to legatee other than universal or residuary ”—(Concluded).

(d) A husband does not take under the Statute of Distributions at all, but by a title paramount; and therefore, he can take neither under the description “next-of-kin by Statute,” nor under the description of “persons entitled under the Statute.” *Milne v. Gilbert*, 2 D.M. & G. 715. **U**

(6) “Next-of-kin” includes the half-blood.

Under a bequest to ‘next-of-kin,’ those of the half-blood are equally entitled with those of the whole blood. *Garrick v. Camden*, 14 Ves. 372; *Milne v. Gilbert*, 5 D.M. & G. 510. **Y**

(7) Next-of-kin means legitimate next-of-kin.

As to this, see Theobald, 6th Ed., p. 279; see, also, 30 B. 500=8 Bom. L. R. 322. **W**

(8) Next-of-kin may include even illegitimate kindred.

But the context may show an intention to include even illegitimate kindred. *Re Wood*, 1902, 2 Ch. 542. **X**

(9) Next-of-kin how ascertained.

Those persons only are to be ranked as next-of-kin of an intestate who were such at the time of the intestate’s death. *Trist. & Coote*, 13th Ed., 98. **Y**

(10) A next-of-kin, though he has intermeddled, cannot be compelled to take out administration.

A next-of-kin cannot be compelled to take out administration, though he has intermeddled with the effects and made himself liable as executor *de son tort*. *Ackerley v. Oldham*, 1 Phill. 248; *Ackerley v. Parkinson*, 3 M. & S. 411. **Z**

23. When the deceased has died intestate ¹, administration of

to whom administration may be granted.

his estate may be granted to any person who, according to the rules for the distribution of the estate of an intestate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased’s estate.

When several such persons apply for administration, it shall be in the discretion of the Court to grant it to any one or more of them ².

When no such person applies, it may be granted to a creditor ³ of the deceased.

(Notes).

General.

Corresponding Indian Law.

(a) This section which lays down a broad rule that the grant shall follow the interest corresponds to Ss. 200 to 207 of the Indian Succession Act, X of 1865, which determine the persons to whom administration should be granted. **A**

(b) The rules in Ss. 20-207 of the Succession Act are not incorporated in the Probate Act being based in part upon a law of intestate succession differing from that of the classes to which the Probate Act applies. See *Hend.*, 3rd Ed., 465; and see, also, the remarks of Dr. Lushington in *Brenchley v. Lynn*, 2 Rob. 470, cited in *Trist. & Coote*, 13th Ed., 61. **B**

1.—“*When the deceased has died intestate.*”

(1) Grant under S. 23 can be made only in case of intestacy.

- (a) Letters of administration can be granted under S. 23 only when there has been an intestacy. 9 C.L.J. 576. C
- (b) It cannot be said that a gift for maintenance is necessarily a gift of a life-estate and that at the death of the donee there is an intestacy as regards the estate of the original divisor. 9 C.L.J. 576. D

(2) As to what property a man is considered to have died intestate.

A man is considered to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect. See S. 25, Act X of 1865. E

2.—“*When several such persons apply.... it shall be in the discretion of the Court to grant it to any one or more of them.*”

(1) Court generally prefers a sole to a joint administration.

- (a) The Court generally prefers a sole to a joint administration, because it is much better for the estate and more convenient for the claimants on it; it never forces a joint administration upon unwilling parties. Will. Exors., 10th Ed., 326, 336 and see cases cited. F
- (b) Thus, where two widows of an intestate applied for a certificate of administration under Act XXVII of 1860, the Court said that the usual and reasonable practice was to grant administration only to one person and granted it accordingly. 5 C.L.R. 368. G

(2) The Court cannot associate in the grant a stranger with a person entitled under S. 23.

On an application for letters of administration to which the applicant is legally entitled under S. 23, the Court has no power to order, under S. 41, that another person who has no present interest in the estate, should be associated with the applicant in the grant. 21 C. 164. H

(3) Where there are several applicants—Procedure.

- (a) Where there are several persons equally entitled to administration, the Court grants it *priori patenti*, i.e., to him who first applies. *Cordeux v. Transfer*, 4 Sw. & Tr. 51. I
- (b) Where there are several next-of-kin in equal degree, the Court grants administration to him among them whom the majority of the parties interested desire. *Elves v. Elves*, 2 Cas. temp. Lee, 573; *Budd v. Silver*, 2 Phil. 115. J

(4) Whole-blood preferred to the half.

Where the contest is between one of the whole blood and one of the half blood, the Court prefers the whole blood unless material objections can be proved. *Mercer v. Moorland*, 2 Cas. temp. Lee, 499. K

(5) Other cases of preference.

- (a) Other things being equal, the Court prefers a son to a daughter, and an elder to a younger brother. 1 Will. Exors., 10th Ed., 336. L
- (b) A man accustomed to business will be preferred to one who is not. *Williams v. Wilkins*, 2 Phil. 100, cited in 1 Will. Exors., 10th Ed., 336. M

2.—“When several such persons apply... it shall be in the discretion of the Court to grant it to any one or more of them”—(Concluded).

(6) A next-of-kin, if a creditor or a bankrupt, will be superseded.

Where the next-of-kin happens to be a creditor or a bankrupt, the Court will supersede him. *Webb v. Needham*, 1 Add. 494; *Bell v. Timiswood*, 2 Phil. 22. N

(7) So also where he is a debtor to the estate.

Where there were grounds for believing that one brother was indebted to the estate of a deceased brother, the Court was held to have exercised a wide discretion in refusing to grant letters of administration to such brother jointly with other brothers of the deceased. 1 B.L.R. Short Notes. iii. O

(8) Where an administrator is appointed, another of the same degree of kindred cannot come in.

Where an administrator is once appointed, another of the same degree of kindred cannot, like a co-executor, come into the administration till the administrator is dead. 1 Will. Exors., 10th Ed., 337. P

(9) Consent of persons interested is not a ground for departing from the rules for grant of administration.

The consent of all persons interested is not a sufficient ground for departing from the general rules as to grant of administration. *In the goods of Richardson*, 2 P. & D. 244; cited in *Hend. 3rd Ed.*, 270. Q

3.—“When no such person applies, it may be granted to a creditor.”

(1) Administration granted to creditor—when and on what ground.

On the failure of every other representative administration, will be granted to a creditor on the ground that he cannot be paid his debt until representation to the deceased is made. 1 Will. Exors., 10th Ed., 350; *Trist. & Coote*, 13th Ed., 106. R

(2) A person buying a debt of the deceased is not entitled to administration.

But the Court will refuse administration to a person who has brought up a debt of the deceased after his death. *Debit v. Deterieuse*, 2 Sw. & Tr. 131; *In the goods of Coles*, 3 Sw. & Tr. 181. S

(3) A surety paying the debt after the death, is entitled.

A surety, who after the death of the principal, pays off the debt, is entitled to apply for administration as a creditor of the deceased. *Williams v. Jukes*, 34 L.J.P. & M. 60, cited in 1 Will. Exors., 10th Ed., 353. T

(4) Where there is neither next-of-kin nor creditor—Procedure.

Where there is neither next-of-kin nor a creditor desirous to take out administration, the Court may grant to any person at its discretion though without any interest. 1 Will. Exors., 10th Ed., 354. U

(5) Whether creditor of a time-barred debt entitled to administration.

(a) In England a creditor is entitled to administration even where his debt is barred. *Coombs v. Coombs*, 1 P. & D. 288, cited in 1 Will. Exors., 10th Ed., 350. V

3.—“When no such person applies, it may be granted to a creditor”—(Concluded).

(b) But, when administration is granted to a creditor whose right of action is barred by limitation, the practice is to make it a condition that he shall give a bond to distribute the assets *pro rata* among all the creditors. (*Ibid.*) W

(c) As to whether in India, in the case of a barred debt, whether the remedy only or the right itself is extinguished; see S. 28 of the Limitation Act, IX of 1908. X

(6) Where several creditors apply, administration granted on what principle.

(a) Where more creditors than one apply, the grant will be made to one who has the largest claim, especially if he is supported by a majority of interests. *Ernest v. Eustace*, Deane 291, cited in Hend., 3rd Ed., 272. Y

(b) The amount of the debt is immaterial except where two or more creditors contend *inter se* for the grant. *Trist. & Coote*, 13th Ed., 107. Z

(c) In a contest between creditors, the Court will prefer one having a judgment debt. *Lord Carpenter v. Shelford*, 2 Lee. 503, cited in *Trist. & Coote*, 13th Ed., 205. A

(7) Under what limitations administration will be granted to a creditor.

A creditor will not be granted administration so as to enable him to prefer his own debt, or so as to defeat the right of retainer of the next-of-kin. *Re Foy*, 98 L.T. 49, cited in Hend. 3rd Ed., 272; see also, *Trist. & Coote*, 13th Ed., 107. B

(8) After creditor is granted administration, when next-of-kin can come in.

Where a creditor has been duly appointed, the next-of-kin cannot, during his life-time, take the administration from him, but upon his death they may come in and claim administration *de bonis non*. *Sheffington v. White*, 1 Hagg. 702, cited in Hend., 3rd Ed., 273. C

(9) In England administration may be granted to the executors of a creditor.

In England, letters of administration may be granted to the executors of a creditor. *Jones v. Beytagh*, 3 Phil., 635; cited in Hend., 3rd Ed., 273. D

(10) Creditor's title inferior to that of all others.

A creditor's title to administration is inferior to that of all others. *Graham v. Maclean*, 2 Curt. 663; *Dunes v. Corunall*, 2 Rob. 142, cited in *Trist. & Coote*, 13th Ed., 106. E

(11) Administration granted to two or more creditors.

In England, the Court will now grant administration to more creditors than one, though formerly it preferred a single creditor. *Harrison's case*, 2 Phil. 449, cited in *Trist. & Coote*, 13th Ed., 109. F

(12) On creditor's application, citation must issue also to the Administrator-General.

When a creditor applies for letters of administration, citation must issue also to the Administrator-General. Hend., 3rd Ed., 269. G

Miscellaneous.

- (1) Letters of administration to a *Bairagi's* estate may be granted according to the custom of his sect.

On the death of a *Bairagi* or an ascetic, his preceptor's preceptor applying for letters of administration to the estate of the deceased is entitled to the same, if he proves that according to the custom prevailing in the sect of which he and the deceased disciple were members, he, as the preceptor of the dead man's preceptor is entitled to his property. 28 C. 608=5 C.W.N. 373. H

- (2) Letters of administration to property acquired by a *Mahant*, to whom granted.

As property acquired by a *Mahant* belongs to the religious shrine of which he is the *Mahant*, letters of administration to such property can be granted only to the person who is shown to have near spiritual relationship with the deceased *mahant*. 6 Ind. Cas. 650. I

- (3) Administration to the estate of a woman leaving the family and becoming a woman of the town.

(i) There is no tie of kindred between a degraded and outcaste woman and her husband's family. 21 C. 697. But see *infra*. J

(ii) See 1 C.W.N. exiv, cited under S. 69, *infra*. K

(iii) In the absence of custom to the contrary, a woman of the town is no heir to her deceased sister who was also a woman of the town, and consequently is not entitled to letters of administration to her estate. 25 C. 254=2 C.W.N. 97. L

(iv) An application for letters of administration to the estate of a deceased prostitute—acquired by prostitution—by her nephew was rejected on the ground that the applicant was not entitled to inherit such estate. 10 C.W.N. 1085. (*Woodroffe, J., dubitante*). M

(v) A woman of the town, who is a Hindu by birth, does not cease to be a Hindu, by reason of her degradation, and succession to her property is governed by the Hindu Law. So, the sister's daughter of a deceased prostitute who has followed her into degradation is not her heir. 6 C.L.J. 372. N

(vi) Where a Brahmin husband, in obedience to Hindu Law, totally and finally abandons his wife on the ground of unchastity inexplicable or unexpiated, so as to destroy all her present and future claims on him and his inheritance, the relationship of marriage is dissolved. 4 N. L. R. 31. O

(vii) Prostitution does not sever the legal relation and, therefore, the degradation of a woman in consequence of her unchastity does not in law entail a cessation of the tie of kindred between her and the members of her natural family or between her and the members of her husband's family. 23 M. 171. P

(viii) Desertion of husband and immoral life does not operate to sever entirely all connection with the husband. The husband might still be heir to property acquired by the wife since she left him. 20 A. 4=3 A.L.J. 537, following 23 M. 171 and dissenting from 21 C. 697. Q

Miscellaneous—(Concluded).**(4) Administration to bastard's estate.**

(a) Where a bastard dies intestate and without issue, his estate devolves upon the Crown as *bona vacantia*. But in such a case, it is customary for the Crown, after deducting a percentage, to make a grant of the property so falling to it to the persons, who, if the deceased had been legitimate, would have been entitled to it as next-of-kin. Norman's Digest of the Death Duties, 2nd. Edn., p. 247. **R**

(b) Under St. 16 and 17, Vict., C. 95, S. 27, which still applies to India, the Governor-General has power to make any grant or disposition of any property accruing by forfeiture, escheat or otherwise, to, or in favour of, any relative or connection of the person from whom the same shall have accrued, or to, or in favour of, any person or persons. **S**

(c) As to notifications issued under the above Act, see Hend., 3rd. Edn., p. 27 T

(5) Administration to the estate of a foreigner.

(a) By the Indian Succession Act, S. 207, it is provided that where the deceased has left property in British India, letters of administration must be granted according to the rules laid down in Ss. 200 to 206 of the Succession Act although he may have been a domiciled inhabitant of a foreign country. See S. 207, Act X of 1865. **U**

(b) There is no corresponding section in the Probate and Administration Act. See, however, S. 145-A, *infra* as to distribution and transfer of assets in the case of a deceased foreigner. **Y**

(c) Under English Law, where a foreigner dies intestate within the British dominions, the Court will grant administration to the person entitled to the effects of the deceased, according to the law of the country of his domicile, and where such latter Court has made a grant, the English Court would generally follow it. See 1 Will. Exors., 10th Edn., 338. **W**

(d) By St. 24 & 25, Vict., C. 121, S. 4, when subjects of foreign States die in the British dominions and there is no person entitled to administer to their estates, the Consuls of such foreign States may administer. See 1 Will. Exors., 10th Edn., 339. **X**

(6) Administrator-General's preferential right to administration.

As to this, see S. 15, Act II of 1874, cited under S. 21, *supra*; see, also, 11 B.L. R. Ap. 6. **Y**

CHAPTER III.**OF LIMITED GRANTS.****General.****(1) General practice with regard to limited grants.**

With regard to limited grants, the general practice is, not to make a limited grant to a person who is entitled to a general grant; nor a general grant to one who is entitled to a limited grant. In *bonis* Dodgson, 1 Sw. & Tr. 260. **Z**

(2) Renunciation or citation necessary before a limited grant is made.

As a general rule, before a limited administration can be granted, the party entitled to the general grant must have renounced or been cited "to accept or refuse." 1 Will. Exors., 10th Ed., 417, 418. **A**

General—(*Concluded*).

- (3) Where whole estate vested in executor, probate cannot be granted for part of the estate.

As to this, see notes under S. 4, *supra*.

B

- (4) Except under special circumstances, general letters of administration should be taken out.

As to this, see notes under S. 14, *supra*.

C

(a).—Grants limited in Duration.

- 208] 24. When the will has been lost or mislaid since the testator's death, or has been destroyed by wrong or accident and not by any act of the testator, and a copy or the draft of the will has been preserved, probate may be granted of such copy or draft, limited until the original or a properly authenticated copy of it be produced.

Probate of copy or
draft of lost will 1.

(Notes).**General.****Corresponding Indian Law.**

This section corresponds to S. 208 of the Indian Succession Act, X of 1865. D

1.—“Probate of copy or draft of lost will.”

- (1) Loss of will is no bar to a grant of probate or administration.

(a) The fact that a will has been lost is not, if its contents be satisfactorily proved, any bar to obtaining a grant of letters of administration with will annexed. 8 C. 864=11 C.L.R. 135. E

(b) A will found to have been duly and validly executed and not to have been revoked, if not forthcoming, may be proved by means of a certified copy. Such a case falls within S. 24 of the Probate Act. Under that section, letters of administration, on the strength of the copy of the will, limited until the original will is produced, may be granted. 31 C. 885=8 C.W.N. 821. F

- (2) What executor must prove on application for probate of a copy or draft of a lost will.

On an application for probate of a copy or draft of a will lost since the death of the testator, the executor must prove; (i) the due execution of the original will; (ii) that it has been in existence since the testator's death and has been lost; and (iii) that the copy is a true one. Trist. & Coote, 13th Ed., 117. G

25. When the will has been lost or destroyed, and no copy has been made nor the draft preserved, probate may be granted of its contents, if they can be established by evidence.

Probate of contents
of lost or destroyed
will 1.

(Notes).

General.

(1) Corresponding Indian Law.

This section corresponds to S. 209 of the Indian Succession Act, X of 1865. H

(2) S. 25 is an enabling section.

S. 25 of the Probate Act, is an enabling section. There is nothing in it to prevent a Court from following the rulings of the Courts in England as to the grant of probate of part of a will. 26 C. 634=3 C.W.N. 617. I

1.—“Probate of contents of lost or destroyed will.”

(1) “Destroyed” meaning.

“Destroyed” means, destroyed after the testator’s death, or in his life-time, either by another person without his consent, or by himself, without intention. Trist. and Coote, 18th Ed., 118. J

(2) Probate of a lost will may be granted on proof of its contents.

The contents of a lost will, like those of any other lost instrument, may be proved by secondary evidence; and the Court will grant probate of the will as so proved. *Sugden v. Lord St. Leonards*, 1 P.D. 154; *Trevalyan v. Trevalyan*, 1 Phil. 154. K

(3) Declarations of testator how far admissible for such purpose.

For this purpose, declarations written or oral of the testator made before or even after the execution of the will may be admitted. *Quick v. Quick*, 3 Sw. and Tr. 442; *Johnson v. Lyford*, 1 P. and D. 546; *Sugden v. Lord St. Leonards*, 1 P. and D. 154. L

(4) The evidence of a single witness is enough to prove contents of lost will.

The contents of a will may be established even by the evidence of a single witness whose veracity and competency are unimpeached. *Flood v. Russell*, 29 Ir. 91; *Sugden v. Lord St. Leonards*, 1 P.D. 154. M

(5) When probate may be granted of a portion of a lost will.

(a) Following the principles of English Law, probate can be granted of a portion of a will. Where the contents of a lost will are not completely proved, probate can be granted to the extent to which they are proved. 26 C. 634=3 C.W.N. 617; following *Sugden v. Lord St. Leonards*, 1 P.D. 154; *Woodward v. Goulstone*, 11 Ap. Cas. 469; see, also, Trist. & Coote, 18th Ed., 119. N

(b) Probate can be granted of a portion of a will after striking out or omitting such portions of it as are proved to have been inserted in it without the testator’s knowledge. 1 C.L.J. 109 (113). O

(c) Where for want of attestation one of the four sheets of which a will consisted could not be admitted to probate, and there was no evidence as to the contents of the original sheet for which the sheet in question had been substituted, and the other three sheets contained only the appointment of executors and the residuary clause, it was held that probate should be refused of the whole will. 20 B. 370. P

1.—“*Probate of contents of lost or destroyed will*—(Concluded).(6) **Where codicil is lost—Procedure.**

In England where a codicil has been lost since the death of the testator without a copy having been made, or the draft kept, and its contents or substance cannot be shown, the Court will grant probate of the will limited, until the original codicil or an authenticated copy thereof can be brought in. Trist. & Coote, 13th Ed., 119. Q

(7) **When probate is lost—Procedure.**

Where the probate is lost, the Court will grant, not a second probate, but an exemplification of the probate from its records. 1 Will. Exors., 10th Ed., 299. R

s. 210]

26. When the will is in the possession of a person, residing

Probate of copy
where original
exists¹.

out of the province in which application for probate is made, who has refused or neglected to deliver it up, but a copy has been transmitted to the executor, and it is necessary for the interests of the estate that probate should be granted without waiting for the arrival of the original, probate may be granted of the copy so transmitted, limited until the will or an authenticated copy of it be produced.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 210 of the Indian Succession Act, X of 1865. S

1.—“*Probate of copy where original exists.*”(1) **Province.**

For definition of —, see S. 3, *supra*. T

(2) **Power of Court to order person to produce testamentary paper in his custody.**

As to this, see notes under S. 54, *infra*. U

s. 211]

27. Where no will of the deceased is forthcoming, but there is

Administration
until will produ-
ced¹.

reason to believe that there is a will in existence, letters of administration may be granted, limited until the will or an authenticated copy of it be produced.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 211 of the Indian Succession Act, X of 1865. Y

1.—“*Administration until will produced.*”(1) **Administration may be granted until a will proved to exist is found.**

Where a will, proved to have been in existence after the testator's death, is accidentally lost, and the contents unknown, the Court will grant administration limited until the original will be found. *In the goods of Campbell*, 2 Hag. 555; *In the goods of Wright*, 1893, p. 21. W

1.—“Administration until will produced”—(Concluded).

(2) Administration may be granted till production of a will from a foreign place.

Administration may, when necessary, be granted till the will of the deceased can be produced from a foreign place to be admitted to probate. *In the goods of Metcalfe*, 1 Add. 843. X

(3) Letters of administration may be granted though will not forthcoming.

At to this, see 31 C. 885 = 8 C.W.N. 821, cited under S. 24, *supra*. Y

(4) Administration until executor can begin to act.

Where an executor is appointed from a time later than the death of the testator, and no person is appointed to act before the period limited for the commencement of the office, the Court must commit administration with the will annexed until there is an executor. *I Will. Exors.*, 10th Ed., 409. Z

(b).—Grants for the Use and Benefit of others having Right.

28. When any executor is absent from the Province in which

[S. 212.]

Administration, with will annexed, to attorney of absent executor¹.

application is made, and there is no executor within the Province willing to act, letters of administration with the will annexed may be granted to the agent of the absent executor, for the use and benefit of his principal, limited until he shall obtain probate or letters of administration granted to himself.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 212 of the Indian Succession Act, X of 1865, but with the word “agent” in place of the word “attorney” of the latter section. A

1.—“Administration, with will annexed, to attorney of absent executor.”

(1) Province.

For definition of—, see S. 3, *supra*. B

(2) Illustrative cases.

(i) As the Presidency of Bengal does not include the Punjab, the High Court of Calcutta was held to have no power to grant Letters of Administration to the Attorney of the executor of a deceased in respect of assets situate in the Punjab. But it has power to grant Letters of Administration in respect of such assets to the Administrator-General under Act XXIV of 1867. 1 B.L.R.O.C. 8. C

(ii) Where a British subject possessed of property, both in India and England died in England leaving a will by which he appointed 4 persons to be his executors in England, and W, his executor in India, “the latter accounting to the former” and W renounced probate, *held* that the attorney of the English executors was entitled to letters of administration with the will annexed in India, as the English executors were intended by the testator to have power of administering his assets in India as well as in England. 15 B.L.R. App. 8. D

1.—“Administration, with will annexed, to attorney of absent executor”—(Continued).

(iii) Where, after a will had been duly proved by the executors in England, the attorney of the executors applied to the High Court for a grant of Letters of Administration limited until the executors should obtain probate in India, purporting to apply under S. 212 of the Succession Act (corresponding to S. 28 of the Probate Act) it was *held* that the application could not be sustained, first, because, only a copy of the will, and not the original, was produced, and secondly, because, the executors could not, under the circumstances, ever obtain probate of the will in India. S. 180 of the Succession Act (corresponding to S. 5 of the Probate Act) might have been applicable, but that the authority of the executor's attorney did not empower him to apply for more than a limited grant. (1905) A.W.N. 251. **E**

(iv) For a case in which letters of administration were granted by the Punjab Chief Court to the agent of an absent executor, see 28 P.R.1871. **F**

(3) What is a proper power of attorney—Whether S. 85 of the Indian Evidence Act as to proof of a power of attorney is exhaustive or not.

(i) In order to comply with the provisions of S. 85 of the Evidence Act, the power of attorney must be executed before, or authenticated by, one of the persons specified in the section. 16 C. 776 (779). *But see infra.* **G**

(ii) On an application for letters of administration to the estate of a deceased, who was domiciled in Scotland, and to whose estate one P had been appointed executor *datine qua Father*, the application being made by one K under a power of attorney granted by B, such power not having been executed and authenticated in the manner provided by S. 85 of the Evidence Act, *held* that the application must be refused. 16 C. 776, *following* Fulton, 72, Morton, 370. **H**

(iii) On an application for letters of administration with copy of will annexed by the attorney of a sole executor, it was *held* that S. 85 of the Evidence Act was mandatory. 33 C. 625 = 9 C.W.N. 986; *but see infra.* **I**

(iv) The language of S. 85 does not warrant the assumption that the provision in S. 85 is of an exhaustive character and that other legal modes of proving the execution of a power of attorney are not admissible. 21 M. 492 (494). **J**

(v) So, where on an application for letters of administration with the will annexed, made by the attorney of the executors therein named, it appeared that the applicant's power of attorney was not executed in the presence of a Notary Public or any other of the persons designated in S. 85, but one of the attestors had made a declaration before a Notary Public that he witnessed the execution of the power by one of the executors and that the signature of the other attestor was genuine, and such declaration was certified by a Notary Public, *held* that the power was sufficiently proved. 21 M. 492, *dissenting from* 16 C. 776. **K**

(vi) The Chief Magistrate of the City of Glasgow being a person lawfully authorized to administer oaths, a declaration as to the execution of a power of attorney taken before him and authenticated by his certificate and the common seal of the City of Glasgow and by a Notarial Certificate was held sufficient proof of the execution of the power. 22 C. 491. **L**

(vii) See, also, 14 Bur. L.R. Part I, p. 33, *cited* under S. 5, *supra*. **M**

1.—“Administration, with will annexed, to attorney of absent executors”—(Continued).

- (4) Where there is an authentication by a Notary, affidavit of identity is not necessary.

In the case of a document purporting to be a power of attorney and to have been executed before, and authenticated by, a Notary Public, no affidavit of identity is necessary, the authentication of the Notary being treated as the equivalent of the affidavit of identity of the executant. 33 C. 625 = 9 C.W.N. 986. N

- (5) **Effect of grant of administration to the attorney of an absent executor.**

A grant of administration to an attorney of an absent executor is tantamount to a grant to the executor himself. *In the goods of Bayard*, 1 Rob. 768; *in the goods of Murguia*, 9 P.D. 236.

N.B.—For consequences of this rule in English Law, see 1 Will. Exors., 10th. Ed., 377. O

- (6) **Revocation of power of attorney and return of principal—Effect.**

(a) The power of attorney being revocable, if the executor revokes it and desires probate, the Court is bound to grant it to him. *Pipon v. Wallis*, 1 Cas. Temp. Lee, 402. P

(b) It is not necessary to expressly revoke such grant, as it determines by the executor returning to the jurisdiction and taking probate. *In bonis Cassidy*, 4 Hagg. 360. Q

- (7) **Death of the absent executor—Effect.**

On the death of the executor, the letters of administration cease to be of any force. 1 Will. Exors., 10th Ed., 378, citing *Webb v. Kirby*, 7 De. G. M. & G. 376. R

- (8) **Administration is granted to attorney, only when principal is absent.**

It is only where the person entitled to probate or letters of administration is absent, that a grant can be made to his attorney or agent. *In the goods of Burch*, 2 Sw. and Tr. 139. S

- (9) **Under special circumstances, administration may be granted to attorney of a resident principal.**

But, under special circumstances, the English Court will allow the attorney of a person residing within the jurisdiction to take out administration:—*e.g.*, where the estate is trust-property, or where the person entitled to the grant is of advanced age and unwilling to take the administration. *In the goods of Bullar*, 39 L.J.P. & M. 26; *in the goods of Roberts*, 1 Sw. & Tr. 64, cited in *Hend.*, 3rd Ed., 278. See *Trist. & Coote*, 18th Ed., 122. T

- (10) **Should the attorney be resident in the province.**

(i) According to the practice in England, it is not necessary that the attorney should reside within the province, provided his surties reside therein. *In bonis Leeson*, 1 Sw. & Tr. 463, cited in *Trist. & Coote*, 18th. Ed., 123. U

(ii) But, under Ss. 28 and 29, it is necessary that the attorney applying for letters of administration, should be within the jurisdiction of the Court. 4 B.L.R. App. 19. Y

1.—“Administration, with will annexed, to attorney of absent executors”—(Concluded).

- (iii) Where, on an application for letters of administration with a copy of an authenticated copy of the will annexed by the attorney of the absent executors under Ss. 5 and 29, it appeared that the attorney as well as his proposed surety were residing outside the jurisdiction of the Chief Court, in which the application was made, *held* that, since Act XIII of 1875 extended the operation of grants by High Court throughout British India, it was sufficient to justify such a grant if the application was made by an attorney who was residing at the time in some part of British India, notwithstanding the language of S. 28. 28 P.R. 1883. **W**

(11) Power of attorney may be a general one.

A general power authorising the attorney (amongst other things) to appear for the principal in a Court of Justice is sufficient. *Majumdar*, 498, *citing* Walker and Elgood, 3rd Ed., 35. **X**

(12) “Use and benefit”—Meaning and effect.

The words “use and benefit” do not exclude the right of those beneficially interested; the person to whom a grant is made for the use and benefit of another out of the jurisdiction is liable to be sued by the parties beneficially interested in the estate as if he had obtained letters of administration in his own right. *Chambers v. Bicknell*, 2 Hare 536, *cited* in *Trist. & Coote*. 13th Ed., 122 (n). **Y**

113.]

Administration with will annexed to attorney of absent person, who, if present, would be entitled to administer¹.

29. When a person to whom, if present, letters of administration with the will annexed might be granted, is absent from the Province, letters of administration with the will annexed may be granted to his agent, limited as above-mentioned.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 213 of the Indian Succession Act, X of 1865, but with the word “agent” in place of the word “attorney” of the latter section. **Z**

1.—“Administration with will annexed to attorney of absent person, who, if present, would be entitled to administer.”

(1) Province.

For definition of —, see S. 3, *supra*. **A**

(2) Practice of the Calcutta High Court.

The practice of the Original Side of the High Court of Bengal is to require the original will, or an exemplification thereof, or an exemplification of the letters of administration to be annexed to the petition, and the power of attorney to be verified to the satisfaction of the Court or a Judge. *Belchamber's Rules*, 686, *cited* in *Ph. & Trev.* 366. **B**

N.B.—See, notes, under S. 28, *supra*.

When a person entitled to administration in case of intestacy is absent from the Province, and no person equally entitled is willing to act, letters of administration may be granted to the agent of the absent person, limited as before-mentioned. [S. 214.]

Administration to attorney of absent person entitled to administer in case of intestacy 1.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 214 of the Indian Succession Act, X of 1865, but with the word "agent" in place of the word "attorney" of the latter section. C

1.—"Administration to attorney of absent person entitled to administer in case of intestacy."

(1) Province.

For definition of—, see S. 3, *supra*. D

(2) Administration to attorney of next-of-kin, when granted.

Where all the next-of-kin reside out of the country, administration may be granted to their attorney. I Will. Exors., 10th Ed., 348. E

(3) Whether administration can be granted to the attorney of one of several persons entitled in equal degree.

(a) In England, the attorney of one of many residuary legatees may take administration with the will annexed without notice to the other residuary legatee; and the attorney of one of many next-of-kins may take like administration without notice to the other next-of-kin. Trist. & Coote, 13th Ed., 123. F

(b) But, under S. 30, it would seem that administration is only to be granted where no person entitled equally with the person giving the power-of-attorney is willing to act. (*Ibid.*) G

31. When a minor is sole executor or sole residuary legatee, [S. 215.]

Administration during minority of sole executor or residuary legatee 1.

letters of administration with the will annexed may be granted to the legal guardian of such minor, or to such other person as the Court shall think fit, until the minor has attained his majority, at which period, and not before, probate of the will shall be granted to him.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 215 of the Indian Succession Act, X of 1865, but with the words "has attained his majority" in place of the words "shall have completed the age of 18 years" of the latter section. H

1.—“Administration during minority of sole executor or residuary legatee.”

(1) When administration *durante minore ætate* granted.

If a person appointed sole executor, &c., is within age, administration *durante minore ætate* must be granted. I Will. Exors., 10th Ed., 386; Trist and Coot., 13th Ed., 124. I

(2) Not granted where there are several executors one of whom is of full age.

But, where there are several executors &c., one of whom is of full age, this kind of administration should not be granted, for, he who is of full age may execute the will. I Will. Exors., 10th Ed., 386. J

(3) Same rule applies to administration in case of intestacy.

So also in the case of intestacy, where the person entitled to administer is under age, administration *durante minore ætate* must be obtained. I Will. Exors. 386. K

(4) Administration during minority of several infants—Effect of one dying or attaining age.

As to this, see notes under S. 32, *infra*. L

(5) “Legal guardian,” scope of the words.

“Legal guardian,” in S. 31 refers possibly to a testamentary guardian or a guardian appointed by the Court, *e.g.*, under Act XL of 1858. Hend., 3rd Ed., 279. M

(6) Testamentary guardian—Father's right to appoint—English Law.

By S. 8 of 12 Car II C. 24 an infant father is given the right to appoint a guardian to his infant children by deed or Will. But as by S. 7 of the Wills Act 1 Vict. C. 26, the Will of an infant is invalid; such an appointment by an infant father, can only be made by deed. M1

(7) Testamentary guardian—Father's right to appoint—Indian Law.

Under S. 47 of the Indian Succession Act—which however is not made applicable to Hindus nor incorporated in the Probate Act a father, whatever his age may be, can, by Will, appoint a guardian or guardians for his child during minority. M2

(8) Testamentary guardian—Mother's right to appoint—English Law.

S. 2 of the Guardianship of Infants Act, 49 and 50 Vict. C. 27, enables a mother, by deed or will, to appoint a guardian or guardians to act after her death and that of the father, jointly with any guardian appointed by the latter. M3

(9) Testamentary guardian of European British subjects in India—Guardian and Wards Act.

(1) Under S. 5 of the Guardian and Wards Act, VIII of 1890, where a minor is an European British subject, a guardian or guardians of his person or property, or both, may be appointed by Will or other instrument to take effect on the death of the person appointing;

(a) by the father of the minor, or

(b) if the father is dead or incapable of acting, by the mother.

(2) Where guardians have been appointed under sub-section (1) by both parents, they shall act jointly. M4

1.—“Administration during minority of sole executor or residuary legatee”—(Continued).

(10) Testamentary guardian—Hindu father's right to appoint.

Assuming that a Hindu father has power to appoint a testamentary guardian, —which was not necessary for the decision of the case—it is not by virtue of any Statute ; for S. 47 of the Succession Act does not apply to the Will of a Hindu. If, therefore, the power exists, it must be under Hindu Law. 31 B. 413. N

(11) Order of preference among guardians *inter se* in England.

(i) In England, where a sole executor or sole residuary legatee is under age, the person entitled to the grant of administration in preference to all others is the guardian appointed by the will or deed of the father under St. 12, Car., II, C. 24, Ss. 3. & 9 ; *In the goods of Morris*, 2 Sw. & Tr., 300, cited in Tr. & Coote, 13th Ed., 125. O

(ii) Next in order is the guardian of the *estate* of a minor appointed by the High Court of Chancery, or a guardian appointed by a competent foreign Court. Tr. & Coote, 13th Ed., 125. P

(iii) If there be no such guardian, the Court itself will appoint a curator or guardian from the next-of-kin of the minor for the purpose of taking the grant. *Rich v. Chamberlayne*, 1 Lee 135. *In the goods of Ewing*, 1 Hagg. 381 ; Hend., 3rd Ed., 279. Q

(12) Whether administration can be granted to the Court of Wards and under what circumstances.

(a) The Court of Wards is not a “ person ” and letters of administration cannot be granted to it. 25 C. 795. *But see infra*. R

(b) The Court of Wards, as such, cannot be appointed Administrator. But, there is nothing to prevent the Court in certain circumstances, as where the testator wished the minor's estate to be entrusted to the Court of Wards, from appointing the nominee of the Court of Wards (in most instances, the Manager), Administrator of the testator's estate, with the will annexed under S. 31 of the Probate Act. 10 C. W.N. 241. S

(13) The Court has a discretion to grant administration during minority to such person as it thinks fit.

It is always within the discretion of the Court to grant administration during minority to such person as it thinks fit, but, in the exercise of such discretion, it has been the practice to grant it to the guardian. *West v. Welby*, 3 Phil. 379. T

(14) When the Court will refuse to grant administration to a guardian.

(i) Where he is very poor. *Havers v. Havers*, Bar. C. C. 23.

(ii) Where he is very old. *Re Ewing*, 1 Hagg. 381.

(iii) Where he is insolvent. *John v. Bradbury*, 1 P. & D. 245, cited in Hend., 3rd Ed., 279. U

(15) Powers of administrator during minority.

(a) An administrator *durante minore etate* has all the ordinary powers of an ordinary general administrator as long as the minority lasts. 1 Will. Exors., 10th Edn., 898-894. *Cope v. Cope*, 16 Ch. D. 49 ; *Re Thompson*, 1 Ir. 356 ; *Re Robinson*, 3 Ir. 429 ; *Monsell v. Armstrong*, 14 Eq. 423. V

(b) See, also, S. 95, *infra*. W

1.—“ Administration during minority of sole executor or residuary legatee ”—(Concluded).

- (16) **Can such administrator be sued by the creditors after his administration is determined.**

It is doubtful whether an administrator *durante minore etate*, if after his administration is determined, liable to be sued by the creditors. See I Will. Exors., 10th Ed., 395. X

- (17) **Such administrator is liable to account to the infant on his coming of age.**

But, he is liable to account to the infant executor on his coming of age. *Ibid.* 396. Y

- (18) **No application granted which is likely to prolong minority.**

An application for a certificate under Act XL of 1858, the result of which would be to prolong minority from 18 to 21 ought not to be granted, when the alleged minor is admittedly very near 18, except under particular circumstances, as where very great weakness of mind is proved, or where some absolute necessity for such certificate is shown. 6 C. 19 = 6 C.L.R. 210. Z

- (19) **Period of minority fixed in the Act applies to all persons whether domiciled in British India or not.**

As to this, see 21 C. 911, *cited* under S. 8, *supra*. A

16.]

- 32. When there are two or more minor executors and no executor who has attained majority, or two or more residuary legatees and no residuary legatee who has attained majority, the grant shall be limited until one of them has attained his majority.**

Administration during minority of several executors or residuary legatees 1.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 216 of the Indian Succession Act, X of 1865, but with the words “has attained his majority” in place of the words “shall have completed the age of 18 years” of the latter section. B

1.—“ Administration during minority of several executors or residuary legatees.”

- (1) **Administration during minority of several infants—Effect of one attaining age.**

If administration be granted during the minority of several infants, it determines upon the coming of age of any one of them. I Will. Exors., 10th Ed., 392; see, also, *Taylor v. Watts*; Fram. K. B. 425, *cited* in Hend., 3rd Ed., 279. C

- (2) **Administration during minority of two infants—Effect of death of one.**

Administration during minority of two infants does not come to an end on death of one of the infants. *James v. Strafford*, 3 P. Wms. 89, *cited* in Hend., 3rd Ed., 279. D

33. If a sole executor or a sole universal or residuary legatee, or a person who would be solely entitled to the estate of the intestate according to the rule for the distribution of intestates' estates applicable in the case of the deceased, be a minor or lunatic, letters of administration with or without the will annexed, as the case may be, shall be granted to the person to whom the care of his estate has been committed by competent authority, or, if there be no such person, to such other person as the Court thinks fit to appoint, for the use and benefit of the minor or lunatic, until he attains majority or becomes of sound mind, as the case may be. [S. 217.]

Administration for use and benefit of lunatic 1.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 217 of the Indian Succession Act, X of 1865, but extends the provision to minors besides lunatics. D-1

I.—“Administration for use and benefit of lunatic.”

(1) Grant of administration under S. 33 is in discretion of Court.

The grant of administration under this section is in the discretion of the Court, no party being of right entitled to it. *In bonis* Southmead, 3 Curt. 28. E

(2) Administration to whom granted where person entitled found lunatic by inquisition.

Where the person entitled to administration has been found lunatic by inquisition, administration will be granted to committee, or with the committee's consent to a residuary legatee. *In the goods of Phillips*, 2 Add. 396 (n); *In the goods of Milnes*, 3 Add. 55. F

N.B.—The Act under which a manager of the estate of a lunatic is appointed in India is Act XXXV of 1858. *Hend.*, 3rd Ed., 281.

(3) Administration to whom granted where not so found.

(a) Where he has not been found lunatic by inquisition, the Court will, on proof of lunacy, grant administration in the absence of the residuary legatee, to the lunatic's next-of-kin for the use and benefit of the lunatic, pending the lunacy. *1 Will. & Exors.*, 10th Ed., 410 *Trist & Coote*, 13th Ed., 132. G

(b) The Probate Act also seems to contemplate administration being granted for the use and benefit of a lunatic, although he has not been found to be such by a commission, for, it provides for the case of there not being a person to whom the care of the estate of the lunatic has been committed. *Hend.*, 3rd Ed., 280. H

1.—“Administration for use and benefit of lunatic”—(Concluded).

- (4) **Husband when entitled to administration for the use and benefit of lunatic wife.**

Where a husband applied under S. 33 of the Probate Act for letters of administration for the use and benefit of his minor wife, *held* that such application was not maintainable until the applicant had been appointed guardian of his minor wife. 34 C. 706. I

- (5) **Mere mental weakness not sufficient for a grant of administration under this section.**

Mere mental weakness is not sufficient. *Evans v. Tyler*, 2 Rob. 131 (132). J

- (6) **“For the use and benefit,” scope of words.**

The words “for the use and benefit of the lunatic” in the section create a special liability as between the administrator and the lunatic on whose behalf he is appointed to act, but, they do not affect the position of creditors dealing with such administrators. 12 O.C. 390. K

- (7) **On application under S. 33, the procedure in S. 34 should be followed and not that under the C.P.C.**

On an application under S. 33 of the Probate Act, for letters of administration for the use and benefit of a minor, the appropriate provision of law which the Judge should follow is that contained in S. 34, the intention of the Legislature being that the Act itself should be looked to for the powers necessary for the proper custody of property pending the progress of proceedings under that Act, instead of leaving the Court to the enforcement of S. 493 of the C.P.C., 1882, which was not enacted for such special purpose. 2 Bom. L.R. 797. L

- (8) **Powers of administrator during lunacy.**

An administrator appointed under this section possesses all the powers conferred by the Act on an ordinary administrator, and creditors dealing with such an administrator are in the same position as creditors of an ordinary administrator. 12 O.C. 390. M

- (9) **A grant may be doubly limited.**

Thus where an intestate left a widow and an infant, and the widow took out administration, but became insane, administration was granted to the aunt of the infant, for the use and benefit of the widow and the infant, during the incapacity of the one and the minority of the other. *In bonis* Binfield. 1 Lee. 625; *Fawkenner v. Jordan*, 2 Cas. temp. Lee. 327. N

- (10) **No provision where one of several executors becomes lunatic after the grant.**

The Act is silent as to what shall be done in cases where there are more executors than one, and one of them has, after the grant, become insane. See in *the goods of* Marshall, 1 Curt. 297 cited in *Hend.*, 3rd Ed., 299. O

34. Pending any suit touching the validity of the will of a deceased person, or for obtaining or revoking any probate or any grant of letters of administration, the Court may appoint an administrator of the estate of such deceased person, who shall have all the rights and powers of a general administrator, other than the right of distributing such estate; and every such administrator shall be subject to the immediate control of the Court and shall act under its direction. [S. 218.]

Administration
pendente lite 1.

(Notes).

General.

(1) Corresponding Indian Law.

This section corresponds to S. 218 of the Indian Succession Act, X of 1885. P

(2) Corresponding English Law.

This section is copied almost *verbatim* from S. 70 of the English Court of Probate Act, 1857, St. 20 & 21 Vict., C. 77. Q

I.—“Administration *pendente lite*.”

(1) Of what the Court must be satisfied before granting administration *pendente lite*.

- (a) Before granting administration *pendente lite* the Court must be satisfied as to the necessity of such an administrator, and as to the fitness of the proposed administrator. 1 Will. Exors., 10th Ed., 400; Trist and Coote, 13th Ed., 135, 136. R
- (b) The Court of Probate would grant administration *pendente lite* in all cases where necessity for the grant is made out, and this is so, because, while the suit is pending, there is no one legally entitled to receive or to hold the assets or to give discharges. 10 C.L.J. 263=3 Ind. Cas. 178. S
- (c) Before appointing an administrator *pendente lite*, the Court should be satisfied that the appointment is necessary and proper. 2 Ind. Cas. 638. T
- (d) A grant of administration *pendente lite* is made only on grounds of absolute or pressing necessity. *Bellew v. Bellew*, 94 L. J. P. & M. 125. U

(2) Such administration granted, though there is a receiver.

In a proper case the Court will grant such administration, even though a receiver has been already appointed in a suit pending between the same parties and affecting the same property as the administration suit. *Tichborne v. Tichborne*, 1 P. & D. 730. V

(3) When the Court will not appoint an administrator *pendente lite*.

But it is not the practice of the Courts to appoint an administrator *pendente lite* where there is a person who can discharge the duties of such an administrator as an executor or a surviving partner. *Mortimer v. Paul*, 2 P. & D. 85; *Horrell v. Wills*, 1 P. & D. 103; cited in Trist, & Coote, 13th Ed., 137. W

I.—“Administration pendente lite”—(Continued).

(4) Powers of administrator *pendente lite*.

Under the section, the administrator *pendente lite* has all the rights and powers of a general administrator, other than the right of distributing the estate. See I Will. Exors., 10th Ed., 402; Trist & Coote, 13th Ed., 138. X

(5) Commencement and termination of duties of administrator *pendente lite*.

- (a) The duties of such an administrator commence from the order of appointment, and if the decree in the action is appealed from, do not cease until the appeal has been disposed of. *Taylor v. Taylor*, 6 P.D. 29. Y
- (b) In the absence of any appeal, his duties terminate with a decree pronounced in favour of a will and do not continue until the executor obtains probate, and the case is not altered if there are no executors. *Wieland v. Bird*, 1894, p. 262. Z

(6) Administrator *pendente lite* becomes *functus officio* on determination of suit in which he was appointed.

Where, in an application for probate of a will by the executors therein named, an administrator *pendente lite* was appointed, and the application was refused, and then the widows of the deceased applied for letters of administration to the same estate in which another administrator *pendente lite* was appointed, *held* that the former administrator should make over the estate to the latter, he having become *functus officio* on the refusal of probate. 7 C.W.N. ccxiv. A

(7) Receiver and administrator *pendente lite* distinguished.

- (a) A receiver appointed in an ordinary civil suit does not represent the estate nor the parties. He only holds the estate for the benefit of the successful litigant. The position of an administrator *pendente lite* is similar to that of a receiver, with this distinction that an administrator *pendente lite* represents the estate for all purposes except distribution. 1 C.W.N. 336. B
- (b) A receiver is a servant of the Court and not of the parties to the suit, and has only such power and authority as the Court may choose to give him. 22 C. 648. C
- (c) A receiver is an officer of the Court, and the parties, cannot, by any act of theirs, add to, or derogate from, the functions of the receiver without authority from the Court. 30 C. 696 (698). D
- (d) An administrator *pendente lite* can be sued without leave of the Court. *In re Toleman*, 1897, 1 Ch. 866; *Gallivan v. Evans*, 1 Ball and Beat 191; *cited in Hend.*, 3rd Ed., 281. E

(8) To whom the Court will grant administration *pendente lite*.

- (i) To one of the parties with the consent of the other. *Parish School, master v. Fraser*, 2 Hagg. 615; *De Chatelain v. De Pantigny*, 1 Sw. & Tr. 34; *cited in Trist & Coote*, 13th Ed., 136. F
- (ii) To a nominee of both when they agree in their nomination. *Northey v. Cock*, 1 Add. 329, *cited in Ibid.* G
- (iii) Jointly to a nominee of each. *Helleir v. Helleir*, 1 Lec. 281; *cited in Ibid.* H

I.—“Administration pendente lite”—(Concluded).

(iv) To an indifferent person rather than to a litigant party. I Will., Exors., 10th Ed., 400. I

(9) In England the Court can appoint an administrator *pendente lite* even on the application of a person not party to the suit.

In England, under S. 70 of St. 20 and 21 Vic., C. 77, where neither of the parties to the suit applies, the Court can appoint an administrator *pendente lite* in contested testamentary and administration suits, even on the application of a person who is not a party to the suit. *Tichborne v. Tichborne*, 1 P. & D. 730; *Re Evans*, 15 P.D. 215; cited in *Hend.*, 3rd Ed., 282; see, also, *Trist & Coote*, 13th Ed., 136. J

(10) A heir-at-law can maintain a suit for administration against an administrator *pendente lite*.

Where the plaintiffs as heirs-at-law had entered *caveat* in an application by the executor for the probate of an alleged will of a deceased Mahomedan, and the application was set down as a contentious cause and the executor appointed administrator *pendente lite*, held that the plaintiffs, who, as heirs under Mahomedan Law, were entitled to a two-third share in the property left by the deceased, even if the will was not established, had the right to maintain a suit for administration by the Court against the administrator *pendente lite*, even though the probate proceedings had not been determined. 1 C.W.N. 336. K

(11) On an application under S. 33 the procedure in S. 34 should be followed and not that under the C.P.C.

As to this, see notes under S. 33, *supra*.

L

(c).—For Special Purposes.

35. If an executor be appointed for any limited purpose speci- [S. 219.]

Probate limited to purpose specified in will 1.

fied in the will, the probate shall be limited to that purpose, and, if he should appoint an agent to take administration on his behalf, the letters of administration with the will annexed shall

accordingly be limited.

(Notes).

General.

(1) Corresponding Indian Law.

This section corresponds to S. 219 of the Indian Succession Act, X of 1865, but with the word “agent” in place of the word “attorney” of the latter section. M

(2) Section based on Coote.

The first part of S. 35 is taken from Coote's Probate Practice. *Hend*, 3rd Ed., 282. N

1.—“*Probate limited to purpose specified in will.*”

(1) Section applies only where an executor is appointed.

(a) S. 35 applies only to the cases where an executor is appointed. Ph. & Trev. 368.

The section has no application to the case where there is simply a direction to the testator's mother to pay certain debts out of certain property.
22 M. 345, cited in *Ibid.* O

(2) Where whole estate is vested in executor, probate cannot be granted limited to part of the estate.

As to this, see notes under S. 4, *infra*.

P-Q

O.]

Administration with will annexed limited to particular purpose 1.

36. If an executor appointed generally give an authority to an attorney to prove a will on his behalf, and the authority is limited to a particular purpose, the letters of administration with the will annexed shall be limited accordingly.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 220 of the Indian Succession Act, X of 1865. R

1.—“*Administration with will annexed limited to particular purpose.*”

Principle of the section.

The principle of the section is that the grant follows the terms of the power.

See Per Sir Cresswell, in *In the goods of Goldsborough*, 1 Sw. & Tr. 295, cited in Hend., 3rd Ed., 283. S

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Administration limited to trust-property 1.

Where a person dies, leaving property of which he was the sole or surviving trustee, or in which he had no beneficial interest on his own account, and leaves no general representative, or one who is unable or unwilling to act as such, letters of administration, limited to such property, may be granted to the beneficiary, or to some other person on his behalf.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 221 of the Indian Succession Act, X of 1865, but with the word “beneficiary” in place of the words “person beneficially interested in the property” of the latter section. T

1.—“Administration limited to trust property.”

(1) Section applicable only to property forming part of the estate of the deceased.

(a) S. 37 of the Probate Act applies only to property in which a deceased person had ownership, so as to constitute it a portion of his estate, although he held it in trust. 2 C.W.N. cccxi. U

(b) Therefore, no letters of administration under this section can be granted to the Mohunt of a Mutt elected in place of the deceased Mohunt in respect of property belonging to the Mutt, in which the deceased Mohunt had no ownership, which formed no part of his estate and which could not be “administered” by the new Mohunt in the sense in which that term is used in the Act. 2 C.W.N. cccxi, *distinguishing* 12 C. 375. Y

(2) When and to whom administration limited to trust property granted in English Law.

(a) In England where a person dies leaving personal property of which he was sole or surviving trustee, *there being no personal representative*, administration will be granted to that property limited to the right, title and interest of the deceased in that property. Coote's Prob. Pract., 13th Ed., 148. W

(b) In England, where there are persons entitled to represent the deceased trustee, such persons must first be cited, unless they should have renounced. (*Ibid.*) X

(c) If there are several parties interested in the fund, the grant will be limited to the interest of the *cestui que trust* making the application, unless the others assent to the grant extending to their respective interests. (*Ibid.*), 149. Y

(d) If only some of the parties elect, the grant will be made to their nominee to the extent of their shares, and the dissentient party or parties are at liberty afterwards to apply for a grant limited to the remaining shares of the fund. (*Ibid.*), 150. Z

(3) Procedure on making a limited grant under S. 37.

Before a limited grant under S. 37 can be made, the persons entitled to the general representation, if any, must renounce, or consent, or be cited. *Pegg v. Chamberlain*, 1 Sw. and Tr. 527. A

(4) Power of disposition of a person obtaining a limited grant under S. 37.

A person obtaining a limited grant under S. 37 does not, by virtue of it, acquire, nor has he power rightfully to dispose of, any interests outside the limits of that grant. Hence, where a person has conveyed to him by the husband the property which stands in the name of his deceased wife, and such person obtains a limited grant under S. 37, he cannot, by virtue of that grant, convey the rights which the heirs of the deceased have in that property. 5 Bom. L R. 784, *on appeal from* 27 B. 108. B

(5) Section applicable to *debutter* property.

(a) The section applies to the case of *debutter* property, where the beneficiary is an idol. 12 C. 375. C

1.—“Administration limited to trust property”—(Concluded).

- (b) So, where a testatrix dedicated property to an idol and appointed an executrix whom she also constituted *shebait* with power to appoint the next *shebait*, and the executrix died without any such appointment, on an application by the sister's son of the testatrix for letters of administration with copy of will annexed, it was held that the idol being the *cestui que trust* was a beneficiary under S. 37 of the Probate Act and that as it could not undertake the management of the estate, administration might under that section be granted to some person on its behalf. 12 C. 375. **D**

(6) Devolution of *shebaitship* of *debutter* property.

- (i) A document executed by a *shebait* of an endowed property appointing another person as *shebait* for the purpose of carrying out the *shebait* and other rites after the death of the former is not a will; and probate of such a document cannot be applied for. 32 C. 1082=9 C.W.N. 1021. **E**
- (ii) In a family governed by the *Mitakshara* law, a person on his birth becomes entitled jointly as *shebait* of *debutter* property held by the family, the same rule governing the devolution of hereditary office and family property. 33 C. 507. **F**
- (iii) As to the devolution of the right of *shebaitship* and of the possession of property dedicated to religious worship. See 17 C. 3=16 I.A. 137 (P.C.); 32 C. 129=32 I.A. 203=8 C.W.N. 809 (P.C.) 29 A. 663=4 A. L.J. 565; 25 C. 354; 18 A. 227. **G**

- 2.] 38. When it is necessary that the representative of a person deceased be made a party to a pending suit, and Administration limited to suit¹, the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other suit which may be commenced in the same or in any other Court between the parties, or any other parties, touching the matters at issue in the said suit, and until a final decree shall be made therein and carried into complete execution.

(Notes).

General.

(1) Corresponding Indian Law.

This section corresponds to S. 222 of the Indian Succession Act, X of 1865, but with the word suit in place of the words "cause or suit" of the latter section. **H**

(2) Section similar to English Law.

The terms of S. 38 are similar to the rules which guide the Court in England. Hend., 3rd. Ed., 284, citing Coote. **I**

1.—“Administration limited to suit.”

(1) S. 38 deals with grant of administration *ad litem*.

The grant of administration under S. 38 is termed administration *ad litem*, i.e., for prosecuting or defending proceedings begun, or to be begun in a Court of justice. Majumdar, 511. J

(2) *Ad litem* and *pendente lite*, distinguished.

A grantee *ad litem* is appointed to represent the deceased person in litigation, and he is a party to the suit; whereas a grantee *pendente lite* is appointed simply to administer the estate of the deceased during litigation. Majumdar, 512, citing Flood on Wills. K

(3) Jurisdiction for application under S. 38.

An application for letters of administration under S. 38 can be granted only by the Judge within whose jurisdiction the deceased had at the time of his death, a fixed place of abode or any property under S. 56, *infra*, 17 B. 689. L

(4) When a limited administration is not enough.

A limited administration is not sufficient in a case which, from its nature and character, according to the practice of the Court, involves general inquiries as to the next-of-kin or as to assets and creditors, or where the relief sought for is general administration. *Penny v. Watts*, 2 Phil. 149; *Dowdeswell v. Dowdeswell*, 9 Ch. D. 294; *In the goods of Chanter*, 1 Rob. 274; *Davis v. Chanter*, 2 Phil. 550, cited in *Hend.*, 3rd Ed., 284; see 1 Will. Exors., 10th Ed., 416. M

(5) Authority of an administrator under S. 38.

Under a grant of this kind, the grantee has only authority to carry on the suit, and has no right to receive the fruits of it. *In the goods of Dodgson*, 1 Sw. & Tr. 260. N

(6) Grant under S. 38 can be made on a mere averment of interest.

Grants of the nature contemplated by the section can be made on a mere averment of interest, without the Court in any way considering the merits of the case. *Maclean v. Dawson*, 1 Sw. & Tr. 425, cited in *Hend.*, 3rd Ed., 284. O

(7) Decree obtained against limited administrator under S. 38—Effect.

Where the grantee of limited letters of administration under the section is made a party to the suit, the estate of the deceased is properly represented, so as to enable the Court to proceed in the cause; and a decree obtained against such an administrator will be binding on any future grantee of general letters of administration. 1 Will. Exors., 10th Ed., 416, citing *Faulkner v. Daniel*, 3 Hare, 199; *Ellice v. Goodson*, 2 Coll. 4. P

(8) Effect of decree or execution against person in possession of estate of testator before grant of probate or letters of administration.

As to this, see notes under S. 12, *supra*.

Q

223.]

39. If, at the expiration of twelve months from the date of

Administration limited to purpose of becoming party to suit to be brought against executor or administrator 1.

any probate or letters of administration, the executor or administrator to whom the same has or have been granted is absent from the Province within which the Court that has granted the probate or letters of administration is situate,

such Court may grant to any person whom it thinks fit letters of administration limited to the purpose of becoming and being made a party to a suit to be brought against the executor or administrator, and carrying the decree which may be made therein into effect.

(Notes).**General.****(1) Corresponding Indian Law.**

This section corresponds to S. 223 of the Indian Succession Act X of 1865. **R**

(2) Corresponding English Law.

This section is founded upon Ss. 1 and 3 of the English St. 38 Geo. III, C. 87, extended to administrators by S. 74 of St. 20 and 21 Vict., C. 77. **S**
Hend., 3rd. Ed., 285. See I Will. Exors., 10th Ed., 404—G.

1.—“Administration limited to purpose of becoming party to suit to be brought against executor or administrator.”

(1) Province, definition.

As to this, see S. 3, *supra*. **T**

(2) “At the expiration of twelve months,” meaning.

The words “at the expiration of twelve months” which are to be found also in the English Statute, have been held to mean *at or after* the expiration of such period. *In the goods of Ruddy*, 2 P. & D. 330, *cited in* I Will. Exors., 10th Ed., 405. **U**

(3) Persons to whom grants under S. 39 have been made.

Under the corresponding English Acts, limited grants of administration were made to the personal representative of a legatee and to the father and guardian of infant legatees. *In the goods of Collier*, 2 Sw. & Tr. 444; *In the goods of Hampson*, 1 P. & D. 1, *cited in* I Will. Exors., 10th Ed., 406 (n). **Y**

(4) When original executor or administrator returns—Procedure.

On the return of the original executor or administrator, he ought to be made a party to the suit in the usual course and the temporary administrator might account, have his costs and be discharged. I Will. Exors., 10th Ed., 407. **W**

(5) Payment to administrator under S. 39 after return of original administrator, when valid.

Payment of a debt to an administrator appointed under the section is a good payment even after the return of the executor or administrator, provided the debtor had no notice of such return. *Clarke v. Hedges*, 1 Lutw, 342, *cited in* I Will. Exors., 10th Ed., 407. **X**

1.—“Administration limited to purpose of becoming party to suit to be brought against executor or administrator”—(Concluded).

(6) When original executor or administrator dies—Procedure.

Where the absent executor or administrator dies, the practice in England is for his executor or administrator, if any, to apply to be made a party to the pending action. *Rainsford v. Taynton*, 7 Ves. 460, cited in I Will. Exors., 10th Ed., 408. Y

(7) Death of original executor or administrator—Effect on authority of administrator under S. 39.

(a) The authority of an administrator appointed under this section does not become void upon the death of the executor or administrator. *Taynton v. Hannay*, 3 Bos. and Pull. 26, cited in I Will. Exors., 10th Ed., 407. Z

(b) For, the administrator was appointed not for a limited period, as in the case of an ordinary administrator *durante absentia*, but for a limited purpose, viz., to become and be made party to the suit and to carry its decree into effect. See *Rainsford v. Taynton*, 7 Ves. 466, cited in I Will. Exors., 10th Ed., 407. A

40. In any case in which it appears necessary for preserving [S. 224.]

Administration limited to collection and preservation of deceased's property 1.

the property of a deceased person, the Court within whose district any of the property is situated may grant, to any person whom such Court thinks fit, letters of administration limited to the collection and preservation of the property of the deceased, and giving discharges for debts due to his estate, subject to the directions of the Court.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 224 of the Indian Succession Act X of 1865, but with the word “appears” in place of the words “may appear” of the latter section. B

1.—“Administration limited to collection and preservation of deceased's property.”

(1) Province, definition.

As to this, see S. 3, *supra*. C

(2) S. 40 deals with grants *ad colligenda bona*.

Grants under this section are termed *ad colligenda bona*. Hend., 3rd Ed., 285. See I Will. Exors., 10th Ed., 355. D

(3) Object of grant under S. 40.

The object of the grant under S. 40 is to prevent damage to the estate or effects of the deceased; and bare necessity is its foundation. Browne's Prob. Prac., 1881, Ed. 197, cited in Majumdar, 514. E

1.—“Administration limited to collection and preservation of deceased's property” —(Concluded).**(4) Illustrative cases of grants *ad colligenda bona*.**

(i) Where it is for the benefit of the absent or unknown next-of-kin, the Court will direct an administration *ad colligenda bona* to dispose of the property or any portion of it by sale. *In the goods of Schwerdtfeger*, 1 P.D. 424; *In the goods of Roberts*, 1898, p. 149, cited in 1 Will. Exors., 10th Ed., 355 (n). F

(ii) Again, under special circumstances, the Court made a grant to a creditor *ad colligenda bona*, limited to collect the personal estate of the deceased, to give receipts for his debt on the payment of the same, and to renew the lease of his business premises, which would expire before a general grant could be made, but without power to dispose of the lease and good-will of the premises or to carry on the business. *In the goods of Clarkington*, 2 Sw. & Tr. 380, cited in (*Ibid.*). G

(iii) Where the estate consisted of timber which was likely to deteriorate, and of trade-debts, the Court made a grant *ad colligenda bona* to a creditor; but directed that after payment of necessary charges, the balance should be deposited in the registry until a general grant should issue. *In the goods of Stewart*, 1 P. & M. 737, cited in *Trist. & Coote*, 13th Ed., 158. H

(iv) Grants *ad colligenda bona* may be made limited to the sale of a ship, or to the protection of cargo, or other matters relating thereto, and to sums due and to become due on bills of exchange. *Trist. and Coote*, 13th Ed., 156. I

(5) To whom grants under S. 40 can be made.

Administration *ad colligenda bona* will be granted not only to any one whom the Court considers for the occasion eligible, but will also be made to the persons who are entitled to a full grant, or even to entire strangers whom mere chance has brought into the affair. *Trist. & Coote*, 13th Ed., 155, 156. J

(6) Can the Administrator-General apply for a grant under S. 40 on an application for probate of will of an illegitimate person.

(a) Where probate was applied for a will of an illegitimate person, it was suggested that the Administrator-General should apply for letters of administration under S. 40. 11 B.L.R. Appx. G. K

(b) See provisions of S. 18 of Administrator-General's Act II of 1874. L

41. When a person has died intestate, or leaving a will of

which there is no executor willing and competent to act, or where the executor is, at the time of the death of such person, resident out of the Province, and it appears to the Court to be necessary or convenient to appoint some person to administer the estate or any part thereof other than the person who under ordinary circumstances would

Appointment, as administrator, of person other than one who, under ordinary circumstances would be entitled to administration 1.

be entitled to a grant of administration, the Judge may, in his

discretion, having regard to consanguinity, amount of interest, the safety of the estate and probability that it will be properly administered, appoint such person as he thinks fit to be administrator;

and in every such case letters of administration may be limited or not as the Judge thinks fit.

(Notes).

General.

(1) **Corresponding Indian Law.**

This section corresponds to S. 225 of the Indian Succession Act, X of 1865 but with the word "appears" in place of the words "shall appear" and the words "the Judge may appoint" in place of the words "It shall be lawful for the Judge to appoint" of the latter section. M

(2) **Corresponding English Law.**

S. 41 is founded upon S. 73 of the English Court of Probate Act, 1857, St. 20 & 21 Vict., C. 77; for cases under that section, see I Will. Exors., 10th Ed., 356. N

(3) **Difference between Indian and English Law.**

But, in the English Act, the words are "and it shall appear to the Court to be necessary or convenient in any such case by reason of the insolvency of the estate of the deceased, or other special circumstances." Hend., 3rd Ed., 287. O

(4) **How far insolvency of the estate, a ground for a grant under S. 41 in India.**

In S. 41 insolvency is not mentioned as a special circumstance which might render it necessary or convenient to make a grant under the section, but it is probable that where it did exist, the Courts here would follow the English cases. Hend., 3rd Ed., 287. P

N.B.—See provisions of Ss. 16 and 64 of the Administrator-General's Act, II of 1874.

I.—"Appointment, as administrator, of person other than one who, under ordinary circumstances, would be entitled to administration."

(1) **Province, definition.**

As to this, see S. 3, *supra*. Q

(2) **Definition of "consanguinity or kindred."**

(a) Kindred or consanguinity is the connection or relation of persons descended from the same stock or common ancestor: see S. 20, Act X of 1865. R

(b) Consanguinity or kindred is defined to be "*vinculum personarum ab eodem stipite descenditum*," the connection or relation of persons descended from the same stock or common ancestor. The consanguinity is either lineal or collateral. 2 Black. Comm. 203; cited in Will. on Exors., 10th Ed., Vol. I, p. 329. S

(3) **Object of grants under S. 41.**

Grants under S. 41 of the Probate Act are made for the protection and preservation of the estate of deceased person. These are made in the exercise of the discretionary powers of the Court and not as recognising any legal interest of the grantees in the estate of deceased persons. T
21 C. 697.

1.—“Appointment, as administrator, of person other than one who, under ordinary circumstances would be entitled to administration”—(Continued).

- (4) **A general statement of necessity is not sufficient to found a grant under the section.**

According to the English Practice, a general statement upon affidavit that “it is necessary for the preservation of the personal estate and effects of the deceased that the grant should be made” is not sufficient. *In the goods of Cook*, 1 Sw. & Tr. 267; *In the goods of Bateman*, 2 P. & D. 242, cited in 1 Will. Exors., 10th Ed., 256 (n). **U**

- (5) **Illustrative cases of grants under S. 41.**

(i) Where a Hindu governed by the Bengal School of Hindu Law died intestate, leaving five sons, two of age and the rest infants, the eldest being absent in England, letters of administration were, under the special circumstances of the case, granted to father-in-law of the eldest son with the consent of the second son. 7 C.W.N. cexliv. **V**

(ii) Where a person died intestate in England and his father who was his next-of-kin was absent in South Africa in military service, and it was improbable that he would return to England at an early date and had not left any power-of-attorney, letters of administration limited until the father's return were granted. *In the goods of Cavendish*, 5, C.W.N. cxxxvi. **W**

(iii) Under S. 41 of the Probate Act the Court could grant letters of administration *de bonis non* with a copy of the will annexed to a person named an executor in the will, but who had renounced, on the death of the residuary legatee who had obtained letters of administration with the will annexed before fully administering the estate. 3 C.W.N. ccxxxviii. **X**

- (6) **Under S. 41, the Court can grant administration to a person not entitled to inherit.**

In certain cases the Court has a discretionary power to grant letters of administration under S. 41 of the Probate Act, to persons not entitled to inherit. 1 C.W.N. cxiv. **Y**

- (7) **Under S. 41, a person entitled may be superseded for just cause.**

S. 41 of the Probate Act applies to a case where, for some just cause, the person who is legally entitled to letters of administration ought to be superseded, and the grant made to another person. 21 C. 164. **Z**

- (8) **But, under S. 41, the Court cannot associate in the grant a stranger with a person entitled.**

It is not in the power of the Court under the above section, to direct that somebody else, who has no present interest in the estate, should be associated with the person who under S. 23 of the Probate Act is legally entitled to administration. 21 C. 164. **A**

- (9) **Court cannot make an arbitrary selection.**

The section does not empower the Court to make a merely arbitrary selection from among persons contending for the grant. *Haynes v. Mathews*, 1 Sw. & Tr. 462 (468). **B**

1.—“Appointment, as administrator, of person other than one who, under ordinary circumstances would be entitled to administration”—(Concluded).

(10) When grants under this section will be made.

- (i) Where the only person entitled to the grant is resident in a distant country, and immediate protection of the property is necessary. See *In bonis Jones*, 1 Sw. & Tr. 13 ; *In bonis Cholwell*, 1 P. & D. 192. C
- (ii) Where the executor and the universal legatee pre-decease the testator, and the next-of-kin being in a distant country cannot be found. See *In bonis Shee*, 4 P.D. 86. D
- (iii) Where the executor nominated in the will cannot be found. See *In bonis Sawtell*, 2 Sw. & Tr. 448. E
- (iv) Where from just cause the person legally entitled to administration ought to be superseded, and the grant made to another person. See 21 C. 164 ; 7 C.W.N. cxxiv. F

(11) Section does not dispense with the necessity of notice to persons entitled.

The section cannot be applied for the purpose of dispensing with the rule requiring notice to the persons entitled to administration in priority to the applicant. *In bonis Cooke*, 1 Sw. & Tr. 267. G

(12) Principles on which Court should exercise its discretion in making grants under S. 41.

- (a) In exercising the discretion under the section, the Court is not to be guided by the wishes or feelings of the parties, but is to look to the benefit of the estate and to that of all the persons interested in the distribution of the property. The first duty of the Court, then, is to place it in the hands of that person who is likely best to convert it to the advantage of those who have claims, either in paying the creditors or in making distribution ; the primary object is the interest of the property. *Per Sir J. Nicholl* in *Earl of Warwick v. Greville*, 1 Phil. 125. H
- (b) The condition *sine qua non* of a grant under this section, is the presence of such special circumstances in the case as render such a grant absolutely necessary, not convenient merely, as being a saving of time or expense to the applicant. *Trist. & Coote*, 13th Ed., 63. I
- (c) The perishableness of the estate is a special circumstance, but not the mere insolvency of the estate, or the mere absence of the executor, or the convenience which an exceptional course would afford to the applicant himself. (*Ibid.*) J

(d).—Grants with Exception.

42. Whenever the nature of the case requires that an exception be made, probate of a will or letters of administration with the will annexed shall be granted subject to such exception.

[S. 226].

Probate or administration with will annexed subject to exception 1.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 226 of the Indian Succession Act, X of 1865. K

1.—“Probate or administration, with will annexed, subject to exception.”

- (1) As a general rule, general letters of administration should be obtained.**

As to this, see notes under S. 14, *supra*.**L**

- (2) When probate or letters of administration with will annexed granted with exception.**

In England, if a testator appoint one executor for a special purpose, or a specific fund only, and another executor for all purposes, the latter may take probate, save and except, for that purpose or fund. And if there be no such executor, the residuary legatee may take administration with the will annexed of the effects of the deceased, with the same exception. Trist. & Coote, 13th Ed., 160. **M**

- (3) When Probate can be granted omitting words of will.**

(a) Where words or clauses have been introduced into a will by accident or mistake, without the knowledge of the testator, the Court may admit the will to probate omitting such words or clauses. *Harter v. Harter*, 3 P. & D. 11; *Morrell v. Morrell*, 7 P. & D. 68; *In the goods of Oswald*, 3 P. & D. 162; *Allen v. Mc. Pherson*, 1 H.L.C. at 209; *In the goods of Duane*, 2 Sw. & Tr. 560; *Rhodes v. Rhodes*, 7 App. Cas. 192, cited in *Hend.*, 3rd Ed., 289. **N**

(b) But except in cases of fraud, accident or mistake, the Court cannot correct the will either by the omission of words or by the insertion of other words. (*Ibid.*) **O**

(c) In granting probate of a will, the Court can exclude therefrom such parts of the will as are not proved to have been prepared under instructions from the testator. 12 Bom. L.R. 569. **P**

(d) See also notes under S. 6, *supra*. **Q**

27.] Administration
with exception 1.

43. Whenever the nature of the case requires that an exception be made, letters of administration shall be granted subject to such exception.

(Notes).**General.****Corresponding Indian Law.**

This section corresponds to S. 227 of the Indian Succession Act, X of 1865. **R**

1.—“Administration with exception.”

- (1) “Grants with exception” under Ss. 42 and 43 are the reverse of “grants of the rest” under S. 44.**

The “grant with exception” under Ss. 42 and 43 is the reverse of *Caeterorum* grant or “grant of the rest” under S. 44, *infra*. It precedes instead of following the limited grant. The difference between these two grants lies only in the order in which they are taken. The two kinds of grants are made for the same purposes and under the same conditions. See Trist. & Coote, 13th Ed., 161. **S**

- (2) When letters of administration to an intestate can be granted with exception.**

Where the testator has made his will for a particular or limited purpose only, e.g., the administration of a fund vested in himself as trustee, the administration of an estate vested in himself as executor, or the

1.—“Administration with exception”—(Concluded).

administration of his own property in some particular district or country, and has died intestate as regards all other property of his own or vested in him, the next-of-kin, without waiting for the executor to take the limited probate to which he is entitled under such circumstances, may take administration of the deceased's estate, save and except what the testator has himself excepted. *Trist & Coote*, 13th Ed., 160, 161. T

(3) Administration may be limited to a particular place.

An Administration may be limited to a particular place. *In the goods of Mann*, 1891, P. 293; *In the goods of Tamplin* (1894), P. 39. U

(4) Administration may be limited to specific property.

In an exceptional case, the Court may grant administration limited to certain specific effects of the deceased, though the general administration is committed to a different person. *In the goods of Watts*, 1 Sw. & Tr. 538; *In the goods of Somerset*, 1 P. & D. 350. Y

(c).—Grants of the Rest.

44. Whenever a grant with exception, of probate, or letters of [S. 223]

Probate or adminis-
tration of rest 1.

administration with or without the will annexed, has been made, the person entitled to probate or administration of the remainder of the deceased's estate may take a grant of probate or letters of administration, as the case may be, of the rest of the deceased's estate.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 223 of the Indian Succession Act X of 1865, W

1.—“Probate or administration of rest.”

(1) S. 44, deals with *cæterorum* grants, made under the same conditions as “grants with exception.”

A grant of the rest, or a grant *cæterorum* as it is technically called, is a grant of probate or administration following upon a limited grant, made for the same purposes, and under the same conditions, as a grant with exception. *Trist & Coote*, 13th Ed., 161. X

(2) Illustrative cases of *cæterorum* grants.

(i) Thus, if a testator has appointed one executor for a specific purpose or a specific fund, together with another executor for all other purposes and effects, and the first executor has taken his limited probate, the other may take probate of the rest of the testator's effects. (*Ibid.*) Y

(ii) If a limited grant has been previously made as on the renunciation of the executor, the residuary legatee may at any time come in and take administration with the will annexed of the rest of the deceased's estate. (*Ibid.*) Z

1.—“*Probate or administration of the rest*”—(Concluded).

(iii) If the deceased had made a will and appointed an executor for a special purpose or for a specific fund or property only, and has died intestate in all other respects, his next-of-kin after the executor has taken a limited probate of the will, are entitled to administration of the rest of the effects of the deceased. (*Ibid.*), 162. **A**

(iv) So also, if a limited administration has been granted of the effects of an intestate, his next-of-kin are entitled to take administration of the rest of the deceased's estate. (*Ibid.*) **B**

(f).—*Grants of Effects unadministered.*

S. 229]

45. If the executor to whom probate has been granted has died

Grant of effects
unadministered 1.

leaving a part of the testator's estate unadministered, a new representative may be appointed for the purpose of administering such part of the estate.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 229 of the Indian Succession Act X of 1865. **C**

1.—“*Grant of effects unadministered.*”

(1) Grants under S. 45, are called grants of administration ‘*de bonis non.*’

Grants under this section are called grants of administration *de bonis non* in English Law. **D**

(2) Administration granted or death of executor before proof is not ‘*de bonis non.*’

If a sole executor dies without having proved the will, administration with the will annexed will be granted to the person entitled; but such administration is an immediate one and not one *de bonis non*. 1 Will. Exors., 10th Ed., 379. **E**

(3) When administration *de bonis non* granted.

(a) Where a sole executor or a sole surviving executor dies after probate intestate, administration *de bonis non*, i.e., of the goods of the testator left unadministered by the executor, should be granted. 1 Will. Exors., 10th Ed., 380. **F**

(b) Thus, where, under the will of a Hindu duly proved, devising property to his adopted son, the estate of the testator vested in his wife who was appointed executrix therein and she died intestate without fully administering the trust of the will, held that administration *de bonis non* was necessary; and so, where the son sued to recover rents due to the estate, neither as representing the executrix, nor as administrator *de bonis non* of the testator, his suit failed on the ground that the estate of the testator was absolutely unrepresented. 16 M. 71. **G**

(4) Grant *de bonis non* on administrator's death.

(a) There is no provision in the Act for a grant *de bonis non* on a sole administrator's death. Majumdar, 528. **H**

I.—“Grant of effects unadministered”—(Continued).

- (b) In English Law on the death of a sole or sole surviving administrator with or without the will annexed, before fully administering the estate, administration *de bonis non* is necessary. Will. I Exors., 10th Ed., 382; Trist & Coote, 13th Ed., 163. I
- (c) Thus, where the original administrator of a deceased intestate was believed to be dead, and additional assets were discovered due to the estate of the deceased, the English Court under S. 74 of the Probate Act, 1857, (St. 20 & 21, Vict. C. 77) granted administration *de bonis non* to one of the next-of-kin, upon her affidavit that she believed the original administrator to be dead or beyond the seas. *In the Estate of Saker*, 1909, P. 233. J
- (5) Where original executor leaves a will, administration *de bonis non* is not necessary in English Law—*Contra Indian Law*.
- (a) Where an executor dies leaving a will after having proved the will of the testator but before he has administered all the estate, in England, his executorship devolves upon his executor; whereas under this Act, the executor's executor is not derivative executor of the original testator, so that, a grant of administration *de bonis non* is necessary. See Hend., 3rd Ed., 290. K
- (b) In India the executor of an executor is not derivative executor of the original testator; and a residuary legatee has a preferential claim for letters of administration to such executor. 12 B.L.R. 423. L
- (6) But where executor is also residuary legatee, Indian Law is same as English Law.

But where the executor is also residuary legatee having a beneficial interest in the estate, and dies before probate or intestate, before he has fully administered the estate, administration with the will annexed may be granted, not to the testator's next-of-kin, but to the executor's personal representative. See S. 20, *supra*; see, also, *Isted v. Stanley* Dyer, 372 (a) cited in Hend. 3rd Ed., 291. M

- (7) “May” in the section is directory and not permissive.

The word “may” in the section is not to be construed as merely permissive, but as directory, and as showing the course which the Legislature intends shall be adopted. *Per Macpherson, J.*, in 12 B.L.R. 423 (428). N

- (8) Administration *de bonis non* may be granted to *debutter* property.

Where a testatrix by her will dedicated certain immoveable property to the *sheba* of an idol and appointed an executrix, whom she also constituted *shebait* with power to appoint her successor, and the executrix died without making any such appointment, on an application by the nephew for a grant of letters of administration with a copy of the will annexed for the *debutter* property, held that S. 45 of the Probate Act authorised the grant to be made, as no *shebait* having been appointed, there still remained some portion of the estate of the testatrix to be administered. 12 C. 375. O

1.—“Grant of effects unadministered”—(Concluded).

(9) No Grant of administration *de bonis non* after estate fully administered.

An application by the widow and administratrix for leave to mortgage certain properties left by the deceased after the estate had been fully administered, and when there were no debts or legacies of the deceased to be paid, should not be granted. For, such applications can be granted only for the purpose of administration, and not after the estate has been fully administered. 3 C.W.N. 635. P

(10) Wrong to say “once an administrator, always an administrator.”

After the administration is at an end, a widow who has obtained letters of administration ceases to be administratrix and remains in possession of the properties as widow and heiress. The idea that “once an administrator, always an administrator,” is wrong and opposed to practice. (*Ibid.*) Q

(11) A charge of maintenance does not extend administration till death of the holder.

It cannot be said that where the widow is herself the administratrix, the estate being charged with her maintenance, is not fully administered till her death. 9 C.L.J. 116 (118). R

(12) In a grant of administration *de bonis non*, not necessary to include a power to dispose of property.

In an application for letters of administration *de bonis non*, it is not necessary to ask for leave to dispose of the property concerned. 23 C. 579. S

(13) All grants may be followed by grants *de bonis non*.

All grants of whatever description, may be followed by *de bonis non* administration. See Trist & Coote, 13th Ed., 167—170. T

(14) Administration *de bonis non* to whom granted.

As to this, see notes under S. 46, *infra*. U

(15) Powers of administrator *de bonis non*.

As to this, see S. 94, *infra*. V

(16) When administration *de bonis non* may be granted to an executor who had renounced.

As to this, see 3 C.W.N. cccxxxviii, cited under S. 17, *supra*. W

(17) When administration *de bonis non* may be granted to the representative of a next-of-kin who had renounced.

A grant *de bonis non* may be made to the representative of a deceased next-of-kin who renounced when the original grant was made. Trist and Coote, 13th Ed., 166. X

(18) When administration *de bonis non* may be granted to the representative of a creditor or legatee.

If the original grant was made to a creditor or a legatee, his representative, if the debt or legacy be still unpaid, or any other creditor or legatee, may take administration *de bonis non* with the will annexed, without any further renunciation on the part of the residuary legatees: but if they were only cited and did not appear, they should be cited again. Trist & Coote., 13th Ed., 166. Y

46. In granting letters of administration of an estate not fully [S. 230.] administered, the Court shall be guided by the same rules as apply to original grants, and shall grant letters of administration to those persons only to whom original grants might have been made.

Rules as to grants of effects unadministered 1.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 230 of the Indian Succession Act, X of 1865. **Z**

1.—“Rules as to grants of effects unadministered.”

(1) Administration de bonis non to whom granted.

As in the case of original grants of administration, administration *de bonis non* will be granted to the person who has the greatest interest in the effects of the original intestate. I Will. Exors., 10th Ed., 383; Trist and Coote, 18th Ed., 163. **A**

(2) Granted to persons to whom the original grant could have been made.

Thus, where an executrix who was also appointed *shebait* with power to appoint her successor died without doing so and before fully administering the estate, *held* that the sister's son of the testatrix, was in the absence of nearer heirs entitled to the grant of letters *de bonis non*, inasmuch as the original grant in respect of the estate might have been made to him. 12 C. 375. **B**

(3) Direct interest preferred to a representative one.

A person having a direct interest may be preferred to those merely entitled in a representative character: but this is not an invariable rule. *Goods of Middleton*, 2 Hagg. Eccl. 61; *Goods of Carr.*, 1 P. & D. 291; *cited* in *Hend.* 3rd Ed. 291. **C**

47. When a limited grant has expired by effluxion of time, or [S. 231.] the happening of the event or contingency on which it was limited, and there is still some part of the deceased's estate unadministered, letters of administration shall be granted to those persons to whom original grants might have been made.

Administration when limited grant expired, and still some part of estate unadministered 1.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 231 of the Indian Succession Act, X of 1865. **D**

1.—“Administration when limited grant expired, and still some part of estate unadministered.”

- (1) **Supplemental or cessate grant under S. 47 and grant *de bonis* under S. 45 distinguished.**

(a) S. 47 relates to *supplemental*, or as they are technically called, *cessate* grants, distinguished from grants *de bonis non* as being *re-grants* of the whole of the deceased's estate, which must be sworn under the same amount as in the case of the original grant, though a part of the estate has been actually disposed of by the first grantee. Hend. 3rd Ed., 291; citing Trist. & Coote, 13th Ed., 171. **E**

(b) But *de bonis non* grant is a grant only of so much as is not administered. See *Abbott v. Abbott*, 2 Phil. 578. **F**

- (2) **Examples of cases when supplemental grants may be made.**

(i) Where an executor has been appointed for a limited period, and that period has elapsed, a substituted executor, if there be such, takes probate. **G**

(ii) Where administration with the will annexed has been granted for the use and benefit of a lunatic executor, the grant ceases on the executor becoming sane, and he is entitled to probate. See S. 33, *supra*. **H**

(iii) If in the last case the administrator should have died before the recovery of the executor, further administration for the use and benefit of the lunatic executor is granted. **I**

(iv) The same rule applies in the case of a grant of administration to a guardian for the use and benefit of an executor during his minority. See S. 31, *supra*. **J**

(v) If in the last case, the guardian dies during the executor's minority, further administration for the use and benefit of the minor executor is granted. **K**

(vi) Where administration has been granted to the attorney of an absent executor, it ceases on the latter duly applying for and obtaining probate of the will, as well as on the death of the attorney. See S. 28, *supra*. **L**

(vii) On the death of the attorney of one of the next-of-kin to whom administration has been granted, a second grant will be made to the attorney of another next-of-kin on notice to the next-of-kin for whom the original grant issued. *Re Barber*, 1898, p. 11. **M**

(viii) When probate has been granted of the substance of a will limited until an original will or an authenticated copy thereof be brought into the registry, the grant ceases on such original or copy being discovered and brought into the registry, and the executor will take probate of the original or copy as the case may be. See S. 24, *supra*. Trist & Coote, 13th Ed., 171-173. **N**

(ix) Where letters of administration to the deceased's estate were granted to the widow, limited during the minority of her infant son, and the son died before attaining majority and before the estate was fully administered, *held* that letters of administration *de bonis non* to the estate of the husband may be granted to the widow under S. 47 of the Probate Act, and her being the heir to the son's estate is no bar to such grant. 6 C.W.N. 581. **O**

CHAPTER IV.

ALTERATION AND REVOCATION OF GRANTS.

48. Errors in names and descriptions, or in setting forth the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the Court, and the grant of probate or letters of administration may be altered and amended accordingly. [S. 232.]
- What errors may be rectified by Court 1.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 232 of the Indian Succession Act, X of 1865. 01

1.—“What errors may be rectified by Court.”

(1) What sort of errors may be rectified.

The name of the deceased may have been mis-spelt, the status of the deceased mis-stated, or the time of the deceased's death or the amount of the estate misrepresented. So in limited grants there may have been a misdescription of the property to be administered, or a mis-recital of the power under which the will has been made, or of a deed by which a trust has been created. Trist. & Coote, 13th Ed., 176. P

(2) Alterations in what names of descriptions allowed.

Alterations in respect of names or descriptions are not confined to those of the testator, but may be made in regard to executors or administrators where omissions or mistakes may have been made. Trist. & Coote, 13th Ed., 180. Q

(3) Case of rectification of name of legatee.

For a case in which the name of the legatee in the probate was ordered to be amended so as to bring it in accordance with the will, see 4 C. 532. R

(4) Case of rectification of date of will.

For a case in which the date of the will in the probate was rectified after it has been issued, see *Re Allchin* 1 P. & M. 664. S

(5) Errors brought to notice of Court by affidavit.

The practice in England is to bring such errors to the notice of the Court by affidavit. Trist. & Coote, 13th Ed., 180. T

(6) Where original grant not available—Procedure.

If the original grant be lost, or inaccessible, a notation or alteration may be made on an exemplification of it. Hend. 3rd Ed., 292 citing Coote. U

(7) Appeals lie to High Court from order refusing to amend error in the probate.

An appeal lies to the High Court from an order refusing to amend a clerical error in the form of probate under S. 622, C.P.C., 1882, though not under S. 263 of the Succession Act, corresponding to S. 86 of the Probate Act. 27 C. 5. Y

(8) Grant may be extended to whole of British India.

Under Rule 766, Benchamber's Rules, a grant may be made so as to extend its effect throughout the whole of British India. Hend. 3rd Ed., 292. W

[S. 233.]

Procedure where
codicil discovered
after grant of admin-
istration with will
annexed 1.

49. If, after the grant of letters of administration with the will annexed, a codicil be discovered, it may be added to the grant on due proof and identification, and the grant altered and amended accordingly.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 233 of the Indian Succession Act, X of 1865. X

1.—“Procedure where codicil discovered after grant of administration with will annexed.”

(1) Codicil, definition.

As to this, see S. 3, *supra*.

Y

(2) Procedure in English Law.

Where administration with a will annexed is granted and a codicil is afterwards found, under English Law, a separate grant will not be made of the codicil, as in the case of probate, but the administration with the will annexed will be revoked, and a new administration granted with both the will and codicil annexed. I Will. Exors., 10th Ed., 455-6, Trist. and Coote, 13th Ed., 193. Z

(3) Procedure where codicil discovered after grant of probate.

For ———, see S. 10, *supra*.

A

(4) When appointment of executors annulled by codicil subsequently discovered.

As to this, see S. 10, *supra*.

B

(5) Procedure where paper incorporated by [reference in will omitted from the probate.

Should an unattested or unexecuted paper, incorporated by the testator in the will, have been omitted from the probate, the probate may be amended by the addition of the incorporated document. Trist. and Coote, 13th Ed., 179, citing *Sheldon v. Sheldon*, 3 N.C. 255 (256). C

[S. 234.]

Revocation or
annulment for just
cause.

50. The grant of probate or letters of administration may be revoked or annulled ¹ for just cause.

“Just cause.”

Explanation.—“Just cause” ² is—

1st, that the proceedings to obtain the grant were defective & in substance;

2nd, that the grant was obtained fraudulently ⁴ by making a false suggestion, or by concealing from the Court something material to the case;

3rd, that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently;

4th, that the grant has become useless and inoperative through circumstances 5;

5th, that the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of this Act, or has exhibited under that Chapter an inventory or account which is untrue in a material respect, 6

Illustrations.

- (a) The Court by which the grant was made had no jurisdiction.
- (b) The grant was made without citing parties who ought to have been cited.
- (c) The will of which probate was obtained was forged or revoked.
- (d) A obtained letters of administration to the estate of B, as his widow, but it has since transpired that she was never married to him.
- (e) A has taken administration to the estate of B as if he had died intestate, but a will has since been discovered.
- (f) Since probate was granted, a later will has been discovered.
- (g) Since probate was granted, a codicil has been discovered which revokes or adds to the appointment of executors under the will.
- (h) The person to whom probate was, or letters of administration were, granted, has subsequently become of unsound mind.

(Old Act).

Act VI of 1889.

S. 11 of this Act added the 5th clause of the explanation to S. 50.

(Notes).

General.

Corresponding Indian Law.

- (a) This section corresponds to S. 234 of the Indian Succession Act, X of 1865, but with a reference to "chapter 7" in place of "part 34" in explanation 5th. D
- (b) The object of S. 234 of the Succession Act is the same as S. 50 of the Probate Act. 11 C. 492 (495). E

1.—"The grant of probate or letters of administration may be revoked or annulled."

- (1) The Court is given a discretion under the section.

There is a discretion vested in the Court in determining whether or not to act under this section. 11 C. 492 (495). F

- (2) Executor who has proved in *common form* may be cited to prove in *solemn form*.

The general rule is that where an executor obtains probate of a will in *common form*, he may afterwards be cited by a person interested to prove it in *solemn form* and if, upon such citation the executor fails to prove the will sufficiently, the probate will be revoked. 1 Will. Exors., 10th Ed., 451. G

1.—“The grant of probate or letters of administration may be revoked or annulled”—(Continued).

(3) When probate granted in *solemn form* is irrevocable.

Probate granted in *solemn form* is irrevocable, (a) where all the parties adversely affected by it have been parties or privies to the proceedings in which it was granted, (b) where such proceeding was quite legal and fair—free from anything fraudulent or collusive, and (c) where there is no later will. Browne's Prob. Prac. 1881, Ed., 99, cited in Majumdar, 537. H

(4) Grant of probate or letters of administration—Its nature and the way in which it can be contested or set aside.

(a) A grant of probate of a will is not in the nature of a summary proceeding to be contested by a regular suit in a Civil Court. It must be contested by a suit in the Court out of which such grant issued, and it must be contested before the Court sitting as a Court of Probate, and not in the exercise of its ordinary civil jurisdiction. 2 N.W.P.H.C. 268. I

(b) The grant of probate is the decree of a Court, which no other Court can set aside, except for fraud or want of jurisdiction. When it is alleged that probate has been wrongly granted, the proper course is to apply to the Court that granted it, for a revocation of the same. Procedure on such application discussed. 4 C. 360 = 4 C.L.R. 175. J

(c) After a grant of probate or letters of administration with the will annexed has been made, the only procedure provided by law for the revocation of such a grant is that laid down in S. 50 of the Probate Act. 33 C. 1001 = 10 C.W.N. 955. K

(d) Where in a suit by the grantee of letters of administration to the estate of a deceased landlord against a tenant for rent, the defendant pleaded that the letters had been obtained on a misrepresentation of plaintiff's relationship with the intestate, held that such a defence could not be successfully raised so long as the letters of administration were not revoked by a competent Court. 10 C.W.N. 422. L

(5) *Prima facie* proof of execution of will is sufficient for a grant of probate in non-contentious cases.

Having regard to the fact that a grant of probate is not irrevocable, and to the importance of a deceased testator's estate being represented as speedily as possible, *prima facie* proof of the execution of his will is sufficient to warrant the grant of probate when the application for such probate is unopposed. 7 C.L.R. 387. M

(6) Procedure on an application for revocation.

When it is sought to revoke a grant of probate on the ground of the invalidity of the will, the proceedings should be initiated by a regular suit, and not by motion on notice. When it is sought to revoke the grant of probate of a valid will, on the ground of some irregularity in making the grant, the proceedings should be by motion on notice. Proceedings of this description should not be initiated by a rule *nisi*. 5 C.W.N. 383 ; see also, 4 C. 360 = 4 C.L.R. 175. N

(7) Notice of prior proceedings is a bar to subsequent application for proof in *solemn form* or for revocation.

(i) When once probate in *solemn form* has been granted, no one who has been cited or taken part in the proceedings, or who was cognizant of them, can afterwards seek to have it cancelled. 5 B. 698. O

1.—“The grant of probate or letters of administration may be revoked or annulled”—(Continued).

- (ii) Those who have appeared as caveators and have been parties to the contentious proceedings for probate are bound by them as well as those who having been served with personal notice have failed to appear. And those “claiming to have any interest” who are not parties to the original proceedings, or who though entitled to be cited, were not served with general notice thereof have for their only remedy an application under S. 50 for the revocation or annulment of the grant of probate or letters of administration : and in making such application they will be limited by the expression “just cause” as defined in S. 50, 6 O. 460 (471). **P**
- (iii) Though ordinarily upon summary proof of a will or proof “in common form” the Judge ought, upon objection, to have the will regularly proved, proof in “solemn form *per testes*” will not be required on the application of a person who had had notice, or been aware of the previous proceedings before the grant of probate issued, and had then abstained from coming forward. 11 C. 492, following *Ratchcliffe v. Barnes*, 2 S. & T. 486 and 5 B. 638. **Q**
- (iv) If a party is cognisant of proceedings for probate or letters of administration and chooses to stand by and allow the proceedings to be concluded in his absence, he will not be allowed to come in afterwards, and have the grant revoked or the proceedings re-opened. It is only in exceptional cases, under certain circumstances and upon certain conditions, such a party will be allowed to re-open the whole matter. 27 C. 927 = 4 C.W.N. 757, referring to *Newell v. Weeks*, 2 Phil. 224. *Ratchcliffe v. Barnes*, 2 Sw. and Tr. 486 ; 5 B. 638. **R**
- (v) Where an executor himself propounds the will, a next-of-kin though not cited, cannot call for proof, if privy to and aware of the first suit. *Newell v. Weeks*, 2 Phil. 224 ; *Bell v. Armstrong*, 1 Add. 872 ; *Ratchcliffe v. Barnes*, 2 Sw. & Tr. 486, cited in 1 Will. Exors., 10th Ed., 245. **S**
- (vi) But this rule does not apply where the parties to the suit compromise it, and the decree is founded on the compromise. *Wythcherty v. Andrews* 2 P. & D. 327, cited in *Ibid.* See *infra*. **T**
- (8) **But revocation enures for the benefit of parties and privies to the prior proceeding.**

Where a probate is subsequently called in by a person adversely affected by it, who was not a party or privy to the action and who though privy to the action, was not cognisant of his right to intervene, and is revoked, such revocation will enure for the benefit of parties and privies to the first action, and who were adversely affected by the revoked probate. *Trist. & Coote*, 13th Ed., 355. See *Young v. Holloway*, 1895, p. 87. **U**

(9) Compromise of probate action, on whom binding.

Although the decree in a probate action will bind all persons who have been parties or privies to the action and preclude them from afterwards impeaching its validity, a person who is only privy to the action is not bound by any compromise entered into without notice to him : nor will such compromise bind infants or persons other than those who are or might have been parties to the compromise. *Norman v. Staines*, 6 P.D. 219 cited in *Trist. & Coote*, 13th Ed., 355. **V**

1.—“The grant of probate or letters of administration may be revoked or annulled”—(Continued).

(10) District Judge cannot act under this section *suo motu*.

A District Judge has no power to commence proceedings to revoke a probate under S. 50 of the Probate Act on his own motion, 8 C.W.N. 578=31 C. 628. **W**

(11) What is the proper order in an application for revocation.

The proper order to make in an application for revocation is to allow it if there are good grounds for revocation and to recall the probate before the propounder is called upon to prove the will in the presence of the objector. 10 C.L.J. 263 (274)=3 Ind. Cas. 178. **X**

(12) Until a case for revocation is made out, question of genuineness of will cannot be gone into.

Where an application was made for revocation of letters of administration with the will of the deceased annexed, and it was prayed that the will should be proved before the application, *held*, that until the applicant made out a case for revocation, the question of genuineness of the will could not be gone into. English Practice and practice of mofussil Courts in India distinguished. 33 C. 1001=10 C.W.N. 955. **Y**

(13) In England revocation of probate to wrong person is coupled with a grant to the right person.

In England the Court never revokes a grant made to a wrong person except where the person having the right to the grant which is to take its place, asks for that and is also prepared to take it at the same time that he makes his application to revoke. *Hend. 3rd. Ed.*, 299, *citing Coote*. **Z**

(14) Second grant of probate or administration without revoking the first when allowed.

(a) Generally, before revocation of the existing probate or administration, the Court will not grant a new one. *I Will. Exors.*, 10th Ed., 451. **A**

(b) But if it is impossible to get the first grant brought in, as where the grantee has left the country, or cannot be served, it will be declared null and void, and another granted to the person lawfully entitled. *Baker v. Russell*, 1 Lee. 167; *Scotter v. Field*, 6 Notes of Cas. 182; *In the goods of Langley* 2 Rob. 408, *cited in* *Trist. & Coote*, 13th Ed., 194. **B**

(15) When the English Court will make a subsidiary grant without revoking original grant.

In certain cases the Court in England will not revoke an original grant, but will make a subsidiary grant, as where a sole executor or sole administrator becomes a lunatic, in which case a new grant will be made to the committee of the lunatic for his use and benefit until he shall become of sound mind, or if there be no committee, to the residuary legatee. *Trist. & Coote*, 13th Ed., 196. **C**

(16) Procedure upon revocation of lost letters of administration.

Upon the revocation of letters of administration which have been lost, an undertaking will be required from the person to whom they were granted, that if they be found, he will bring them in, and that they will not be acted upon. *In the goods of Carr*. 1 Sw. & Tr. 111, *cited in* *Trist. & Coote*, 13th Ed., 194, 195. **D**

1.—“The grant of probate or letters of administration may be revoked or annulled”—(Continued).

- (17) **Right to apply for revocation not taken away by acting in concert with another.**

The fact that the petitioner for revocation of probate was acting in concert with somebody else could not take away the right which she otherwise possessed of applying for revocation. 12 C.W.N. 6. **E**

- (18) **Proceedings for revocation by a widow, when binding on the reversioner.**

A previous application for revocation by the widow of the deceased having failed, it was held to bind a reversioner, unless it could be proved that the previous proceeding had been collusive and fraudulent. 33 C.101 = 10 C.W.N. 955. **F**

- (19) **Lapse of time or acquiescence no bar to citing executor to prove in solemn form.**

A next-of-kin or other party whose interest is adversely affected by a probate, is not barred by lapse of time or acquiescence or by the receipt of legacies, from requiring executors to prove a will in solemn form. *Merryweather v. Turner*, 3 Curt. 802. **G**

- (20) **Delay in application for probate or for its revocation may be explained.**

On an application for revocation of probate made 12 years after the grant of probate, the High Court held the terms of the will to be reasonable and the evidence sufficient to establish the will, considering the difficulty of establishing a will 18 years after its execution, the persons competent to give the best evidence having died; it also held that “just cause” had not been shown by the applicants for revocation. The Judicial Committee, under the circumstances of the case, affirmed that decision, and pointed out that the delay in taking out probate—the application for probate having been made only 6 years after the testator’s death—was accounted for by the fact that, until the date of the application for probate, there was no very urgent necessity for relying upon the will. 31 C. 914 = 9 C.W.N. 49 (P.C.). **H**

- (21) **Rules as to jurisdiction in applications of revocation.**

(a) The test of jurisdiction in applications for grant of probate, viz., whether or not the deceased had, at the time of his death, his fixed place of abode or some property, moveable or immovable, within the jurisdiction of the particular District Judge to whom the application is made, is also to be applied to applications for revocation of probate. 8 C. 570 = 10 C.L.R. 409. **I**

(b) But one Court would not have power to set aside a probate granted by another Court of co-ordinate jurisdiction. Ph. & Trev. 376. **J**

(c) If the grant was made without jurisdiction or had been obtained by fraud, it might be treated as a nullity. Ph. & Trev. 377. **K**

- (22) **Rules as to *onus* of proof in applications for revocation.**

(a) If there has been no previous contention, and the will has only been proved summarily, or in common form as it is called, that is, without any opposition and merely *ex parte* to the satisfaction of the Judge, who can know nothing of the circumstances or the state of the family, then he ought, in all ordinary cases, to have the will regularly proved a fresh so as to give the objector an opportunity of testing the evidence in support of the will before being called upon to produce his own evidence to impeach it. 11 C. 492 (495). **L**

1.—“The grant of probate or letters of administration may be revoked or annulled”—(Continued).

- (b) But where there has been already full enquiry as to the genuineness of the will, the Judge would probably take the previous grant of probate as *prima facie* evidence of the will, and so shift the *onus* on to the objector. 4 C. 360 (364)=4 C.L.R. at 179. **M**

(23) Burden of proof in suit for declaration that a person died intestate.

In a suit for a declaration that a certain person died intestate, the burden of proof is upon the person who sets up a will and not upon the plaintiff who impeaches it. 5 C.W.N. 895=28 A. 405=28 I.A. 136 (P.C). **N**

24) Trial of issue as to interest of objector.

Both in cases where an application is made for revocation of a grant, and in those where an application for a grant is made, it is frequently convenient that the question of interest of the person opposing the will, should, if it be in issue, be first determined, as, in case it be found that the opponent of the will has no interest, the expenses of a contested proof of the will will be avoided. Ph. & Trev. 376. **O**

(25) Objection of want of interest must be taken at the earliest stage.

The want of interest is an objection which must be taken at the earliest possible stage of the proceedings. 2 N.W.P.H.C. 268 (275). **P**

(26) What interest is sufficient to enable a person to oppose a grant of probate or letters of administration.

As to this, see notes under S. 69, *infra*.

Interest sufficient to support an application for revocation.

A.—PERSONS HELD TO HAVE SUCH INTEREST.

(i) Legatee.

Semble:—A legatee under a will has “an interest” sufficient to maintain a suit for the revocation of probate. 2 N.W.P.H.C. 268. **R**

(ii) Reversioner.

(a) A presumptive reversioner to property with which a will deals, has a sufficient interest in the property to enable him to maintain a suit in respect of such property and to maintain a case for the revocation of probate. 10 C.L.R. 409=8 C. 570, *following* 6 C. 460. **S**

(b) A reversioner is entitled to apply for revocation of letters of administration under S. 50 of the Probate Act. 6 C.W.N. 912 (914). **T**

(iii) Purchaser from the executor.

(a) Persons who are purchasers of interests under a will, from the executor have a right to intervene in an application for revocation of probate. 19 C. 48. **U**

Thus a mortgagee of the estate of a deceased has an interest in such estate entitling him to resist an application to withdraw probate. 19 C. 48. **V**

(iv) Purchaser from the heir.

(a) *Semble*:—A person interested by assignment in the estate of the deceased, may, where a will has been set up and proved at variance to his interests, apply for the revocation of probate of the will so set up. 4 C. 360=4 C.L.R. 175. **W**

1.—“The grant of probate or letters of administration may be revoked or annulled”—(Continued).

Interest sufficient to support an application for revocation.

—(Continued).

A.—PERSONS HELD TO HAVE SUCH INTEREST.

—(Concluded).

- (b) The purchaser from the heir *ab intestato* of a deceased person was held to have such an interest in the estate of a deceased person within the meaning of S. 69 of the Probate Act as to entitle him, when a will is set up and proved at variance with his interest, to apply for revocation of the probate of the will so set up. 20 C. 37, following 4 C. 360 and approved in 28 C. 587. **X**
- (c) If the heirs of a deceased person can make an application for revocation of the letters of administration of a will alleged to have been executed by the deceased, the purchaser of the estate of such person from his heirs has a *locus standi* to make an application for the same purpose. 28 C. 587, referring to 4 C. 360; 20 C. 37. **Y**
- (d) The assignee from the widow, the next heir of a deceased person, may, where a will has been set up and proved at variance with his interests, apply for revocation of the probate. 8 C.W.N. 748. **Z**
- (v) **Attaching creditor—(Doubtful).**
- (a) The attaching creditor of a person who has inherited the property of his deceased father, may apply for revocation of probate of a will of the deceased at variance to his interests. 6 C. 429=7 C.L.R. 337, *Confirmed on appeal* in 10 C. 19=10 I.A. 80=13 C.L.R. 314. **A**
- (b) Assuming that a purchaser from the heir can oppose the grant of probate or apply to have it revoked, it is *very doubtful* whether an attaching creditor can do so, at least in a case which is not founded on the ground that the probate has been obtained in fraud of creditors. 10 C. 19=10 I.A. 80=13 C.L.R. 314 (P.C.). **B**

B.—PERSONS HELD NOT TO HAVE SUCH INTEREST.

(i) **A maintenance-holder against the estate.**

Where one of the two widows of the adoptive father of the testator, who was entitled to maintenance out of her husband's estate, applied for revocation of the probate of the will, *held* that the applicant had no such interest in the estate as will entitle her to make the application under S. 50 of the Probate Act. 4 C.W.N. 602 (609), *distinguishing* 11 C. 492. **C**

(ii) **Executor or administrator who has obtained probate or letters of administration.**

(a) An executor who has obtained probate of a will and an administrator who has obtained letters of administration with the will annexed, cannot, as such, take proceedings himself to call in question the validity of the will. *In the goods of Chamberlain*, 1 P. and D. 316, *cited* in I Will. Exors., 10th Ed., 458. **D**

(b) When a probate having been obtained in the name of several persons as executors, one of them applied for revocation on the ground that the will was a forgery and that he himself did not apply for probate and was not cited, and that the probate was obtained behind his back, *held* that he was entitled to have his name struck out of the probate, but that he had no *locus standi* to challenge the will. 12 C.W.N. 573. **E**

N.B.—But an ordinary administrator is not in the same position as an executor inasmuch as the condition of the bond implies, that if he

1.—“*The grant of probate or letters of administration may be revoked or annulled*”—(Concluded).

Interest sufficient to support an application for revocation.

—(Concluded).

B.—PERSONS HELD TO HAVE SUCH INTEREST

—(Concluded).

should discover that the deceased left a will, he ought to inform the Court of the fact, and take the necessary steps to have the grant to him revoked. *Hend.* 3rd Ed., 300. See *Elme v. Da Costa*, 1 Phil. 173.

(iii) **Person claiming adversely to testator.**

(a) A person disputing the right of a deceased testator to deal with certain property as his own cannot properly be regarded as having an interest in the estate of the deceased. His action is rather that of one claiming to have an adverse interest. 17 C. 48 (52). F

(b) An objector claiming specific property adversely to, and not through the testator, is not a person who has such an interest in the estate of the deceased as will entitle him to ask for a revocation of a grant of probate. 7 P.R. 1902. G

(c) Where in a case the applicant's claim was that a house claimed by the respondent as legatee, was his property adversely to, and not through, the testatrix, it was held that his remedy was by a suit and not by application for revocation. 2 P.L.R. 1902, (*distinguishing* 8 C. 880 on the ground that there the objector was interested in the estate of the deceased). H

(iv) **Case of a woman leaving the family and becoming a woman of the town.**

(a) On an application for revocation of probate of the will of a degraded and outcasted woman, made by a nephew of her husband, held that the applicant had no interest in her estate, entitling him to maintain the application as there was no tie of kindred or right of inheritance between a degraded and outcasted woman and her husband's family. 21 C. 697; but see *contra*, 23 M. 171 and 29 A. 4. I

(b) See also 1 O.W.N. cxiv, cited under S. 69, *infra*. J

(c) See also notes under S. 23, *supra*. K

2.—“*Explanation... just cause*”

(1) **Explanation of “just cause” in the section is exhaustive.**

The words “just cause” as explained in S. 50 of the Probate Act are exhaustive, and not merely illustrative. 24 C. 95. See, also, 26 B. 792 (798). L

(2) **Examples to S. 50 are not exhaustive.**

(a) The examples to the section are apparently not intended to be exhaustive and the Court would act upon other circumstances which show that it would be expedient or equitable that a grant should be revoked. *Hend.* 3rd Ed., 298. M

(b) Thus, where an executor of a forged or revoked will obtains probate, or an executor obtains probate of a will while a suit is pending touching its validity in another Court, or a minor obtains probate on the suggestion or tacit understanding that he is of full age, or an executor obtains probate of a will of a living person, the probate will be revoked, *Ibid.*, citing *Trist. & Coote*, 18th Ed., 190; *In the goods of Napier*, 1 Phil. 88; *Trimlestown v. Trimlestown*, 2 Hagg. Ec. R. 243. N

(c) The Court can revoke a grant if an administrator has disappeared. *Goods of Covell*, 15 P.D. 8, cited in *Trist. & Coote*, 18th Ed., 192.

2.—“Explanation . . . Just cause”—(Concluded).

- (d) Where letters of administration are granted after the renunciation of the executor who has previously intermeddled with the estate, and such executor is subsequently compelled to take probate, this is just cause for the revocation of the letters. *Trist. & Coote*, 13th Ed., 191. P
- (e) A grant will be revoked, if a woman claiming to be the relict of an intestate, but who has not been legally married, has obtained administration of the estate of the deceased as of her husband. *In the goods of Moore*, 3 N. C. 601, cited in *Trist & Coote*, 13 Ed., 190. Q
- (f) A grant will also be revoked, if persons claiming to be an intestate's next-of-kin who are in reality illegitimate relatives only, or are mere imposters, or are not nearest of kin, there being others nearer, have obtained administration. *In the goods of Bergman*, N. C. 22 cited in *Ibid.* R
- (3) What is not a ground for refusing probate is not a ground for revoking it.
- What would not have furnished a ground for refusing probate can form no ground for revoking it, because the grant still stands good for the purposes for which it was granted. 26 B. 792 (797) *Per Crowe, J.* S

(4) No revocation on mere ground of convenience.

Probate or administration cannot be revoked on mere ground of convenience. *Goods of Loveday*, 1900, p. 154; *In re Colcough*, 1902, 2 Ir. 499, cited in *Hend.* 3rd Ed., 300. T

(5) No revocation of an administration long outstanding as a general rule.

Generally speaking, the Court will not revoke an administration which has been outstanding for a considerable time, unless weighty reasons be shown. *Koster v. Sayle*, 1 Curt. 691; cited in *Hend.* 3rd Ed., 300. U

(6) Consent of parties interested, no ground of revocation.

(a) Consent of all parties interested that the revocation will be for the benefit of the estate, is no ground of revocation, even if the grantee may have done nothing by virtue of the grant, and much less where he has intermeddled. *In re Hislop*, 1 Rob. 457; *In re Reid*, 11 P. & D. 70. Y

(b) Where a general grant is properly made, the practice is against revoking it even with the consent of the grantee, unless he has become incapable by act of God, mere age or infirmity not being sufficient grounds. *In the goods of Morris*, 2 Sw. & Tr. 360, cited in *Hend.* 3rd Ed., 299. W

3.—“1st, that the proceedings . . . were defective.”

(1) Want of jurisdiction as a ground for revocation.

(a) Where the attorney for an executrix and the District Judge both knew that effects of the testator existed in British India, outside the Punjab, and in spite of this, the one applied for probate, and the other granted letters of administration, not with the will, but with a copy of the will annexed, and the will was not filed as required by S. 81, *infra*, held the proceedings to obtain the grant were so defective in substance as to furnish a “just cause” for revocation of the grant. 1 P.R. 1902=37 P.L.R. 1902; see *Illus.* (a) to section 50. X

3.—“1st, that the proceedings.....were defective”—(Continued).

- (b) Where a Judge exercising the original testamentary and intestate jurisdiction of the High Court granted probate of a will to the Official Trustee of Bengal on the grounds that the Official Trustee could be appointed as executor and that he was a corporation sole, it was held that even assuming the grant of such probate to have been erroneous, it cannot be said that the Judge acted without jurisdiction so as to bring the case within the scope of S. 50 of the Probate and Administration Act. 37 C. 397. Y

2) Absence of citation as a ground for revocation.

- i) A grant of letters of administration with the will annexed without a citation being issued to the executor appointed by the will calling upon him to accept or renounce executorship as required by S. 16 of the Probate Act, is so defective as to constitute “just cause” for revocation. 12 B. 164. Z
- (ii) Upon an application for revocation of probate of a will alleged to have been made by the applicant's husband, upon the grounds that no citation was published, that the applicant was a minor living under the care of the grantee of the probate and having no opportunity of understanding his *mala fides* and improper acts, and that the will was spurious and forged, it was held that the Court ought to give her an opportunity of proving her ignorance of the prior proceedings, order a new trial as to the *factum* of the will, and not dismiss the petition after throwing the burden of proving the entire case on the applicant. 8 C. 880 = 11 C.L.R. 190. A
- (iii) If a will which affects the interest of an infant, be admitted to probate without the infant being cited, when he attains his majority, he is entitled to require the executor to prove the will in his presence; and the absence of citation upon the infant is “just cause” under S. 50 for revoking the probate, as the grant was made without citing parties who ought to have been cited. 2 C.W.N. 100. B
- (iv) For a case in which letters of administration were revoked on the ground that the proper citation was not issued, even though the person to whom it was not issued was not a beneficiary under the will, see 2 C.W.N. 607. C
- (v) When an heir-at-law, who is not an executor, is not cited in an application for probate of a will, he is entitled to have the will proved in his presence. In such a case, the question is not whether the will propounded is genuine or not, but whether the heir-at-law has made out a *prima facie* case for enquiry. 30 C. 528 = 7 C.W.N. 450. D
- (vi) Where an applicant for probate of a will took out citation upon a minor who was presented by the applicant herself as guardian, held that the proceedings to obtain the grant were defective in substance as to constitute “just cause” for revocation. 12 C.W.N. 6. E
- N.B.**—The proper course in such a case would be to have somebody appointed by the Court to act as guardian for the minor or to take out citation against the minor as represented by her next friend or an officer of the Court having no adverse interest to the minor. 12 C.W.N. 6 (7).

3.—“1st, that the proceedings...were defective”—(Concluded).

- (vii) Where the applicant for revocation under S. 50 of the Probate Act was a minor when the proceedings for probate were being taken, it was held that he ought to have been represented by a guardian *ad litem* other than his mother who had joined in the application for probate, and citation ought to have been issued upon such guardian. 10 C.L.J. 263 (275)=3 Ind. Cas. 178. F & G

(3) When absence of citation is not a “just cause,” for revocation.

- (a) Mere absence of a special citation, in proceedings in which probate of a will is granted, is not, when the person to whom a citation has not been issued is otherwise aware of the proceedings, a “just cause” for revocation of probate. And the fact that the person who complains of absence of such citation, is a minor, makes no difference. 18 C. 45; referring to *Ratchcliffe v. Barnes*, 2 Sw. & T. 486; *Newell v. Week*, 2 Phil. 224; *Wycherly v. Andrews*, 2 P. & D. 327; 11 C. 492; 5 B. 638. H
- (b) Mere omission to serve a special citation would not by itself be a sufficient ground for revoking the grant if it was shown that the person, on whom the citation ought to have been served, had knowledge of the application for probate. The *onus* of proving that he had such knowledge rests on the party who alleges it, and it is not necessary for the party who applies for the revocation of the grant to prove not only that no special citation was served on him, but also that he had no knowledge of the proceedings. 9 C.W.N. 190. I
- (c) See also notes *supra* under the heading ‘notice of prior proceedings, a bar to subsequent application for revocation.’ J

(4) Scope of Illus. (b).

Illustration (b) does not refer only to cases where, as in the class of cases contemplated under S. 22, it is imperative on the Court to issue a special citation, it refers to all cases where the grant is made without citing the parties, who ought, in the opinion of the Court to have been cited. 2 C.W.N. 100 (105). *Per Banerjee, J.* K

(5) Citation, meaning and purpose.

As to this, see notes under S. 16, *supra* and S. 69, *infra*. L

(6) Issue of citations.

As to this, see S. 69, *infra*. M

4.—“2nd, that the grant was obtained fraudulently.”

(1) Execution of will obtained by fraud—Effect.

There is nothing in the Indian Succession Act (and consequently in the Probate Act) to deprive a District Court, as Court of Probate, of jurisdiction to hear and determine an application to revoke grant of probate of a will on the grounds of the execution of such will having been obtained by fraud and coercion. 2 N.W.P.H.C. 268. N

(2) Administration obtained fraudulently—Effect.

A grant of letters of administration which has been obtained fraudulently is void *ab initio*. 33 C. 713=3 C.L.J. 422=10 C.W.N. 678; referring to *Abraham v. Cunningham*, 2 Lee. 182; *Ellis v. Ellis*, 1905, 1 Ch. 613. O

4.—“2nd, that the grant was obtained fraudulently”—(Concluded).

(3) Probate obtained fraudulently—Effect.

Although a will cannot, either before or after probate, be set aside on the ground that the will was obtained by *fraud on the testator*, yet where the probate has been obtained by *fraud on the next-of-kin*, equity will interfere and either convert the wrong-doer into a trustee in respect of such probate, or compel him to consent to a repeal or revocation of it in the Court in which it was granted. See *Barnesly v. Powell*, 1 Ves. Sen. 119 and other cases cited in 1 Will. Exors., 10th Ed., 435. P

(4) Probate obtained of forged will—Effect.

To revoke a grant of probate on the ground of forgery, the proper course is to make an application, under S. 50 of the Probate Act and not to institute a suit. 5 C.W.N. 377 (381); see Illus. (c) to S. 50. Q

5.—“4th, that the grant has become useless and inoperative through circumstances.”

(1) Cl. 4 is taken from the English Law.

Cl. 4 of the Explanation to S. 50 is taken directly from the English Law. See Trist. & Coote's Prob. Prac. 13th Ed., 189, 191, 192. R

(2) Existence of assets out of the Province comes within the clause.

Where probate was granted having effect throughout the Province of Sindh, and the Life Insurance Company refused to pay the money due on the Policy of the deceased on the ground that their head office was situated at Bombay and that therefore the probate was ineffectual, it was held that the applicant was not entitled to have the probate extended to the whole of India, as the preliminaries required by Act VIII of 1903 had not been complied with, but that he was entitled to have the grant annulled under S. 50, Explanation 4, to enable her to apply for a fresh grant in the proper form. 1 S.L.R. 177 (Civil). S

(3) Unfitness or incompetency of executor does not come within the clause.

Under S. 50 of the Probate Act probate can only be revoked for “just cause,” and unfitness or incompetency of an executor does not fall within the meaning of “just cause” as explained in the section; so that apparently, an executor, however unfit or incompetent he may be, cannot be removed by the Court from his post, though he may be removed for certain specified reasons, e.g., his omission to exhibit an account of the assets which have come into his hands. 21 C. 195. T

(4) Mismanagement by executor does not come within the clause.

Mismanagement by an executor does not come within the purview of cl. 4, S. 50 of the Probate Act. 24 C. 95. U

(5) Subsequent immorality of executor does not come within the clause.

(a) That the grantee of a *Mahant's* will, under which he became the head of the religious institution, had, since taking charge of the office, taken to an immoral course of conduct, resulting in his exclusion from the community of *Mahant*, was held to be no ground for a revocation of the probate under S. 50. 6 C. 11=6 C.L.R. 265. V

5.—“4th....that the grant has become useless and inoperative through circumstances”—(Continued).

- (b) There is no analogy between such a case and the case cited in *Illus.* (b) which contemplates the case of an executor who is acting under a will and whose subsequent lunacy disbles him from so acting. 6 C. 11 (13). W
- (c) The ground of decision in 6 C. 11 was that the circumstances which had supervened would not have justified the refusal of probate if they had existed at the time at which it was granted, and therefore they were not grounds for revocation of the probate. 26 B. 792 (793). X
- (6) **Bankruptcy of executor does not come within the clause.**
An application for revocation of probate on the ground that the executor had become bankrupt was refused. *Hills v. Mills*, 1 Salk. 86. Y
- (7) **Whether conviction for criminal offence comes within the clause.**
(a) It has not been decided in England or in India as to whether a conviction of an executor or administrator of a criminal offence in no way connected with his conduct as such executor or administrator is a sufficient ground for revoking the probate or letters of administration.
(b) But in one case where an administrator was convicted of a criminal offence and sentenced to a term of imprisonment, it was held that this was “just cause” for revocation of the letters of administration under cl. 4 of S. 50. 2 C.W.N. cccix. Z
- (8) **Want of harmony between co-executors does not come within the clause.**
On an application by one of two executors for revocation of a probate previously granted to both, it was held that that the expression that “the grant has become useless and inoperative through circumstances” in cl. (4) of the section did not apply to a case where the allegation was that the two executors appointed by the will, to whom probate had been granted, found it difficult to work harmoniously in concert. 72 P.R. 1894. A
- (9) **Birth of posthumous son to testator does not come within the clause.**
Where the widow of the deceased testator applied for revocation of probate granted to the executors on the ground that the will had become inoperative by the birth of a posthumous son to her who had succeeded to the property, which on his death within a month after the grant of probate, had devolved on her as his heir, *held* that the circumstances which had supervened with regard to the devolution of property would not have justified the refusal of probate if, they had existed at the time at which it was granted, and that they were therefore no grounds for revocation. 26 B. 792. B
- (10) **Examples in English Law under this clause.**
(i) Where after a grant of probate to two executors, one becomes a lunatic, probate will be revoked and a new grant made to the same executor, power being reserved to the lunatic of taking probate on the recovery of his reason. *Trist. & Coote*, 13th Ed., 191. C
(ii) Where after a grant of probate to three executors, one of them became physically incapacitated from acting, owing to an accident and consequent nervous shock. (*Ibid.*) D
(iii) Where administration with will annexed has been granted to two or more residuary legatees of whom one subsequently becomes a lunatic. *Ibid.*, citing *In the goods of Phillips.*, 2 Add. 335. E

5.—“4th....that the grant has become useless and inoperative through circumstances”—(Concluded).

- (iv) Where one of two administrators becomes of unsound mind. *Trist. & Coote*, 13th Ed., 192, *citing In the goods of Newton*, 3 Curt. 428. **F**
- (v) Where a creditor after a grant of administration, has paid himself his debt, and left the country. *Ibid.*, *citing In the goods of Jenkins.*, 3 Phil. 33. **G**
- (vi) Where a creditor having been paid his debt, is desirous *bona fide* of retiring from the administration of the estate. *Ibid.*, *citing In the goods of, Hoare.* 2 Sw. & Tr. 361 (n). **H**

6.—“5th.....that the person to whom the grant was made has omitted to exhibit an inventory or account....or has exhibited an inventory or account which is untrue in a material respect.”

Nature of conduct contemplated by the clause.

- (a) Under cl. (5) of S. 50 of the Probate Act, mere failure to file the accounts within the specified time is not sufficient, but it must be established that the grantee has wilfully and without reasonable cause omitted to exhibit the inventory or account. Nor is it enough if the inventory or account is incorrect, but it must be untrue in material respects. 4 Bom. L.R. 979. **I**
- (b) To successfully maintain an application for revocation of probate under S. 50 of the Probate Act, on the ground of the omission of an executor or administrator to file an inventory or account, it must be proved to the satisfaction of the Judge that the omission was wilful or without reasonable cause. 9 C.W.N. 190. **J**

Miscellaneous.

(1) Revocation of grant of letters of administration, no bar to a fresh application.

Where a grant of letters of administration, made by a District Judge had been revoked under the provisions of S. 50 of the Probate Act, it was held that the “just cause” for revocation being removed, the Judge had jurisdiction to entertain a fresh application for the same object. 20 A. 109. **K**

(2) No limitation for applications for probate or for revocation.

- (a) The Limitation Act is not applicable to applications for probate or for their revocation. See 6 C. 707, and the other cases *cited* under S. 55, *infra*. **L**
- (b) So, if there is nothing special, an application for revocation may be made at any time after the grant. *Merrywather v. Turner*, 3 Curt. 802. **M**

(3) Whether a review lies in testamentary proceedings.

As to this, see notes under S. 55, *infra*. **N**

(4) Effect of revocation upon antecedent payments.

As to this, see S. 84, *infra*. **O**

(5) Provision for delivering up a revoked grant.

As to this, see S. 157, *infra*. **P**

(6) Revocation of probate where codicil subsequently discovered appointing different executors.

As to this, see S. 10, *supra*. **Q**

(7) Revocation of grant made to the Administrator-General.

For—, see S. 26 of the Administrator-General's Act II of 1874. **R**

CHAPTER V.

OF THE PRACTICE IN GRANTING AND REVOKING PROBATES AND LETTERS OF ADMINISTRATION.

Jurisdiction of District Judge in granting and revoking probates, &c.

51. The District Judge shall have jurisdiction in granting and revoking probates and letters of administration ^[S. 235.] in all cases within his district.

(Notes).

General.

(1) **Corresponding Indian Law.**

This section corresponds to S. 235 of the Indian Succession Act, X of 1865. **S**

(2) **The section creates a new jurisdiction in favour of the Mofussil Civil Courts.**

The jurisdiction created in the mofussil by S. 235 of the Indian Succession Act, (corresponding to S. 51 of the Probate and Administration Act), is a new jurisdiction, which, before the passing of the Act, did not belong to the Civil Courts. 6 C. 460 (471). **T**

1.—“ The District Judge shall have jurisdiction in granting and revoking probates and letters of administration.”

(1) **District Judge, definition.**

As to this, see S. 3, *supra*.

U

(2) **District Judge has jurisdiction under this section to grant probate of a Buddhist will.**

Under the general jurisdiction given to the District Judge by this section to grant probates in all cases within his jurisdiction, he may grant probate of the will of a Buddhist though made after 1865. 10 W.R. 417 = 2 B.L.R. 79. **Y**

(3) **Originally, District Courts had no power to grant probates of Hindu wills made prior to Hindu Wills Act.**

The only powers conferred on mofussil Courts being in respect of wills made on or after the 1st day of September, 1870, probate of a will, made by a Hindu prior to that date cannot be granted by a mofussil District Court. 6 B.L.R. 138. **W**

(4) **Nor of Mahomedan wills.**

A District Court has no jurisdiction to admit the will of a Mahomedan to probate. 6 B.L.R. 391. **X**

(5) **After the passing of the Probate and Administration Act there is such jurisdiction.**

(a) Since Act V of 1881, applications for the grant of probate or letters of administration in respect of Hindu wills made prior to 1st September 1870, can be entertained by District Courts. 14 C. 37. **Y**

(b) An application may be made, and probate or letters of administration granted in respect of wills executed before the 1st day of September 1870, although it is not obligatory to do so by law. 17 C. 272. **Z**

1.—“The District Judge shall have jurisdiction in granting and revoking probates and letters of administration”—(Continued).

- (6) A District Judge has jurisdiction to revoke probate on ground of will having been obtained by fraud and coercion.

(a) There is nothing in the Act to deprive a District Court, as a Court of Probate, of jurisdiction to hear and determine application to revoke grant of probate of a will on the ground of the execution of such will having been obtained by fraud and coercion. 2 N.W.P.H.C.R. 268. **A**

(b) See also notes under S. 50, *supra*. **B**

- (7) Where order of District Court refusing probate is reversed on appeal, it alone must issue the probate.

Where, on appeal from the District Court, it was found by the High Court that a will was proved, it was held that a subsequent application for probate should be made to the District Court. 17 C. 686. **C**

- (8) In Assam, the jurisdiction is in the Judicial Commissioner.

Assam does not come within the definition of a Province, but of a District for the purposes of Act X of 1865; and the jurisdiction in granting probates and letters of administration under S. 235 of that Act is vested, not in the Deputy Commissioner, but in the Judicial Commissioner. 12 W.R. 424. **D**

- (9) *Factum* of will may be gone into in application for Succession Certificate.

Where in answer to an application under the Succession Certificate Act (VII of 1889) a will is set up as having been made by the person with respect to whose estate the application is made, the Court trying that application has jurisdiction to try the question whether or not there was a will, though ordinarily questions regarding a will should not be decided on a summary application for a certificate. 31 A. 236=6 A. L.J. 171=2 Ind. Cas. 213. **E**

- (10) District Judge's order on a probate application cannot be referred to High Court.

A District Judge's order on a probate application is not final and cannot be referred to the High Court under S. 617 of the C.P.C. 1882. But the High Court, may, as a Court of concurrent jurisdiction, entertain such an application under S. 87, *infra*. 5 C. 756=7 C.L.R. 228.

- (11) Concurrent jurisdiction of High Court. **F**

As to this, see S. 87, *infra*. **G**

- (12) Jurisdiction for grant of administration to native estates originally proceeded on the principle of consent.

(a) In granting administrations to native estates, the interference of the Courts originally proceeded upon the supposition of the consent of the parties interested. *Per Pell, C. J.* in 1 Morton's Rep. 75, cited in Hend. 3rd Ed., 806. **H**

(b) The High Court cannot compel a native to prove a will in solemn form, unless he have applied for probate and thus submitted himself to the jurisdiction. 1 M.H.C.R. 59. (Decided before the Hindu Wills Act) **I**

(c) The power of the Court to grant probates and administrations in native estates, where there is property within the local jurisdiction, has of late been expressly recognised. Fulton's Rep. 339—40, cited in Hend. 3rd Ed., 806. **J**

1.—“The District Judge shall have jurisdiction in granting and revoking probates and letters of administration ”—(Concluded).

- (13) Originally the High Court had no jurisdiction over assets out of the Presidency.

The High Court of Bengal has no power to grant letters of administration in respect of assets situate in the Punjab under the Succession Act (or the Probate Act), though it can grant to the Administrator-General under the Administrator-General's Act. 1 B.L.R.O.C. 3—(Decided before the amendment of S. 50, *infra*). K

- (14) Rules as to jurisdiction in applications for revocation.

As to this, see notes under S. 50, *supra*. L

- (15) Powers regarding grant of probate of Moulmein Recorder's Court.

As to this, see notes under S. 12, *supra*. M

N.B.—See notes under S. 2, *supra*.

52. The High Court may, from time to time, appoint such [S. 235-A].

Power to appoint Delegate of District Judge to deal with non-contentious cases 1.

judicial officers within any district as it thinks fit to act for the District Judge as Delegates to grant probate and letters of administration in non-contentious cases, within such local limits as

it may from time to time prescribe :

Provided that, in the case of High Courts not established by Royal Charter, such appointment be made with the previous sanction of the Local Government.

Persons so appointed shall be called “ District Delegates.”

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 235-A of the Indian Succession Act, X of 1865. N

1.—“Power to appoint Delegate of District Judge to deal with non-contentious cases.”

- (1) “High Court” defined—General Clauses Act.

“High Court” used with reference to civil proceedings, shall mean the highest Civil Court of appeal in the part of British India in which the Act or Regulation containing the expression operates. S. 24 of Act X of 1897 (General Clauses). O

- (2) Local Government, definition of—General Clauses Act.

“Local Government” shall mean the person authorised by law to administer executive Government in the part of British India in which the Act or Regulation containing the expression operates, and shall include a Chief Commissioner. S. 3. (29) of Act X of 1897 (General Clauses). P

- (3) Local Government, definition of—Indian Succession Act.

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(a) There is nothing in the Act to deprive a District Court, as a Court of Probate, of jurisdiction to hear and determine application to revoke grant of probate of a will on the ground of the execution of such will having been obtained by fraud and coercion. 2 N.W.P.H.C.R. 268. A

(b) See also notes under S. 50, *supra*.

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Power to appoint Delegate of District Judge to deal with non-contentious cases 1.

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Provided that, in the case of High Courts not established by Royal Charter, such appointment be made with the previous sanction of the Local Government.

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- (2) Local Government, definition of—General Clauses Act.

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- (3) Local Government, definition of—Indian Succession Act.

“Local Government” shall mean the person authorized by law to administer executive Government in such part. S. 3, Act X of 1865. Q

1.—“Power to appoint Delegate of District Judge to deal with non-contentious cases ”—(Concluded).**(4) Contention, meaning.**As to this, see S. 73, Explanation, *infra*.**R****(5) When probate or letters of administration can be granted by District Delegate.**As to this, see Ss. 58, 73, 74 and 75, *infra*.**S****(6) A District Judge of Bengal has power to transfer a probate case to a Subordinate Judge.**

A District Judge has power under cl. (d) Sub.s. 2 of S. 23 of the Bengal, N.W. P. and Assam Civil Courts Act XII of 1887, to transfer a probate case for trial to a Subordinate Judge. 25 C. 340.

T

[S. 236].

53. The District Judge shall have the like powers and authority in relation to the granting of probate and letters of administration, and all matters connected therewith, as are by law vested in him in relation to any civil suit or proceeding depending in his Court.

District Judge's powers as to grant of probate and administration 1.

(Notes).**General.****(1) Corresponding Indian Law.**

This section corresponds to S. 236 of the Indian Succession Act, X of 1865.

U**(2) Corresponding English Law.**

S. 53 may be compared with S. 25 of the English St. 20 and 21, Vict., C. 77, giving the Court of Probate similar powers and jurisdiction as are vested in the High Court of Chancery in relation to suits pending before it.

Y**1.—“District Judge's powers as to grant of probate and administration.”****(1) Section obscure.**

This section is somewhat obscure. Stoke's Succession Act 157.

W**(2) District Judge, definition.**

As to this, see S. 3, *supra*.

X

[S. 237.]

54. The District Judge may order any person to produce and bring into Court any paper or writing being or purporting to be testamentary, which may be shown to be in the possession or under the control of such person ;

District Judge may order person to produce testamentary papers.

and if it be not shown that any such paper or writing is in the possession or under the control of such person, but there is reason to believe that he has the knowledge of any such paper or writing, the Court may direct him to attend for the purpose of being examined respecting the same,

and he shall be bound to answer such questions as may be put to him by the Court, and, if so ordered, to produce and bring in such paper or writing, and shall be subject to the like punishment under the Indian Penal Code, in case of default in not attending or in not answering such questions or not bringing in such paper or writing, as he would have been subject to in case he had been a party to a suit, and had made such default,

and the costs of the proceeding shall be in the discretion of the Judge.

(Notes).

General.

(1) **Corresponding Indian Law.**

This section corresponds to S. 237 of the Indian Succession Act, X of 1865. Y

(2) **Analogous provision in the Civil Procedure Code.**

Compare Order 16, Rules 5, 6 and 14 of the C.P.C., 1908. Z

(3) **Corresponding English Law.**

By St. 20 and 21 Vict., C. 77, S. 26, amended by St. 21 and 22 Vict., C. 95, S. 23, the Court of Probate can order any person to produce any instrument purporting to be testamentary and shown to be in his custody or control, and may direct such person to attend for the purpose of being examined, who shall be subject to process of contempt in case of default. See I Will. Exors., 10th Ed., 229-230. A

1.—“District Judge may order person to produce testamentary papers.”

(1) **District Judge, definition.**

As to this, see S. 3, *supra*. B

(2) **Form of instrument does not affect validity of will.**

As to this, see notes under “will” in S. 3, *supra*. C

(3) **Duplicate will is a testamentary paper within the section.**

A duplicate is part of a will and is to be considered a testamentary paper within the rule in the section. *Killican v. Parker*, 1 Cas. Temp. Lee, 662. D

(4) **Exemplification of a will is a testamentary paper within the section.**

An exemplification of a will is an instrument falling within this section, and it may be ordered to be produced and brought in. 8 B.L.R. App. 76. E

(5) **Solicitor who prepared the will cannot refuse to produce it.**

The lien of an attorney or solicitor does not extend to the original will executed by his client; and he cannot refuse the production of it. *Georges v. Georges*, 18 Ves. 294; *Lord v. Wormleighton*, Jac. 580; *Balch v. Symes*, 1 Turn and Russ. 87, cited in I Will. Exors., 10th Ed., 231. F

1.—“District Judge may order person to produce testamentary papers”

—(Concluded).

(6) Presumption as to due execution of document not produced.

- (a) The Court shall presume that every document called for and not produced after notice to produce, was attested, stamped and executed in the manner required by law. See S. 89, Indian Evidence Act, I of 1872. **G**
- (b) This presumption might be applicable where the will is proved to be in the possession of a person having an interest to oppose it, and who, being a party to the proceedings, does not produce it after notice to produce. **H**

(7) Presumption as to will 30 years old produced from proper custody.

The presumption contained in S. 90 of the Evidence Act is in terms applicable to wills, but the greatest possible care would have to be exercised in its application, as only in the case of a most satisfactory explanation of the delay would a Court be justified in admitting to probate a will 30 years old. **I**

(8) Practice of the Madras High Court.

A citation to a person to bring in and deposit in the registry probate or letters of administration, or an alleged will or codicil or other testamentary document, shall appoint a day certain before which the same is to be brought in; and if the person cited alleges that he is unable to comply with the citation, he shall, before the said day, file in Court an affidavit of the cause of his alleged inability, and give notice thereof to the person issuing the citation. In case of default, or if the Court considers the said affidavit to be insufficient, the person cited shall be considered in contempt of Court; and any party to the proceedings may apply that the person cited may be ordered to attend for the purpose of being cross-examined on his affidavit, or that he may be committed for contempt. Rules of the Original Side, Madras High Court, 482. **J**

(9) An executor may be ordered to lodge will in Court and take out probate.

For a case in which an executor was ordered to bring the will into Court and take out probate. See 21 B. 75. **K**

(10) Whether the Court can compel an executor to take out probate in any case.

As to this, see notes under S. 16, *supra*. **L**

(11) When attachment of contempt will issue in case of disobedience.

In England where a subpoena has been personally served upon a person to bring in a testamentary paper, and such person fails to comply therewith, the Court will not at once order an attachment to issue against him, but will make a preliminary order that he shall attend in Court to be examined in reference to his possession of such paper. *Parkinson v. Thornton*, 37 L.J.P. & M. 3, cited in I Will. Exors., 10th Ed., 280 (A). **M**

55. The proceedings of the Court of the District Judge, in relation to the granting of probate and letters of administration, shall, except as hereinafter otherwise provided, be regulated, so far as the circumstances of the case will admit, by the Code of Civil Procedure ¹.

Proceedings of District Judge's Court in relation to probate and administration.

(Notes).

General.

(1) Corresponding Indian Law.

This section corresponds to S. 238 of the Indian Succession Act, X of 1865. N

(2) The section is very wide.

It is plain that the Legislature intended by S. 55 of the Probate Act that the C.P.C. should be read with the Probate and Administration Act *mutatis mutandis*. The section is very wide. 6 C.W.N. cxlvii. O

*1.—“The proceedings of the Court of the District Judge....shall
....be regulated, so far as the circumstances of the case will
admit, by the Code of Civil Procedure.”*

(1) District Judge, definition.

As to this, see S. 3, *supra*. P

(2) Provisions of S. 30, C.P.C., as to suits on behalf of all in same interest applies to testamentary proceedings.

A suit by a legatee on behalf of himself and other legatees, without the leave of the Court under S. 30, C.P.C., Act XIV of 1882, is not maintainable. 11 C. 213. Q

(3) Provisions of the C.P.C., as to adding parties, are applicable to testamentary proceedings.

In a suit by a legatee against an executor for a legacy the executor may, for his own protection, apply that the other legatees shall be made parties, so that the rateable abatement, if any, may be ascertained in a manner binding on all parties interested—provided such application is made at the earliest opportunity and the Court thinks that such addition of parties is necessary, having regard to Ss. 34 and 32, C.P.C., 1882. 26 B. 301. R

(4) Provisions of S. 103, C.P.C., as to setting aside orders of dismissal for default not applicable to testamentary proceedings.

S. 103, C.P.C., 1882, is inapplicable to an application for probate. An executor presenting an application for probate of a will cannot be regarded as a plaintiff who brings a suit in respect of a cause of action. 14 C. W.N. 924. S

(5) Provisions of C.P.C., as to setting aside *ex parte* decrees are applicable to testamentary proceedings.

The provisions of the Civil Procedure Code as to setting aside *ex parte* decrees apply to an application to revoke the grant of probate on the ground of want of proper citation. 8 C. 880 (882). T

(6) Provisions of the C.P.C., as to suits by and against minors and persons of unsound mind are applicable to testamentary proceedings.

(a) The provisions of the Civil Procedure Code as to suits by and against minors and persons of unsound mind apply to testamentary proceedings. Ph. & Trev. 400. U

1.—“The proceedings of the Court of the District Judge....shall....be regulated, so far as the circumstances of the case will admit, by the Code of Civil Procedure”—(Continued).

(b) Thus, a minor on whose behalf an application is made, must be represented by a next friend. A caveat must be entered on his behalf by a next friend. And if he be made a party to proceedings as being interested in the estate, or a citation be served upon him, a guardian for the suit must be appointed on his behalf. Ph. & Trev. 400. **Y**

(7) Provisions of the C.P.C. as to suits in *forma pauperis* are applicable to testamentary proceedings.

(a) The provisions of the C.P.C. as to suits by or against paupers are applicable to testamentary proceedings. Ph. & Trev. 400. **W**

(b) An executor may in a proper case, be allowed to petition for, and if entitled thereto, to obtain probate, in *forma pauperis*. 18 B. 237. **X**

(c) An application for revocation of probate can be made in *forma pauperis*. 6 C.W.N. cxlvii. **Y**

(8) But in England an executor or administrator cannot sue or defend in *forma pauperis*.

In England, an executor or administrator cannot sue or defend as a pauper, because the indulgence extends only to persons suing in their own rights, and not as executor or administrator. *Paradise v. Sheppard*, 1 Dick. 136, cited in II Will. Exors. 10th Ed., 1541. **Z**

(9) Provisions of the C.P.C., as to stay of execution are applicable to testamentary proceedings.

A decree directing the issue of a grant of probate to the propounder of a will is one that is capable of execution, and stay of execution of such a decree can be granted under S. 545, C.P.C., 1882. 5 C.W.N. 781 (P.C.) = 24 A. 13. **A**

(10) What is execution of a decree for grant of probate.

After the Court makes an order for the issue of a grant of probate, two things have to be done under it in order to clothe the propounder of the will with the character of executor; he has to pay the stamp fees on probate, and the Court has to hand out to him the probate itself. This is carrying out, i.e., “executing” the order. 5 C.W.N. 781 = 24 A. 13 (P.C.). **B**

(11) When a plea of *res judicata* is effectual in a Probate Court.

As to this, see notes under S. 12, *supra*. **C**

(12) Executor cannot submit the *factum* of the will to arbitration.

Semble.—An executor against whose application for probate a caveat has been entered, cannot submit to arbitration the question whether the will propounded by him was duly executed by the deceased. 21 B. 335; see, also, 3 C.W.N. lxxviii. **D**

(13) Nor can the Court refer the question to arbitration.

(a) *Semble*.—Though under S. 83, the proceedings in contentious cases are to take as nearly as may be the form of a regular suit, according to the provisions of the Civil Procedure Code, the Court before whom an application under S. 50 is instituted has no jurisdiction to delegate the decision of the question raised to arbitrators, even with the consent of the parties. 72 P.R. 1894. See, also, Ph. & Trev. 400. **E**

(b) S. 508, C.P.C., providing for reference to arbitration by Court is not applicable to probate proceedings. *Per Farran, C.J.*, in 21 B. 335 (342). **F**

1.—"The proceedings of the Court of the District Judge....shall....be regulated, so far as the circumstances of the case will admit, by the Code of Civil Procedure"—(Continued).

(14) How far an agreement or compromise as to genuineness of will valid.

(a) In a proceeding for the probate of a will, the will must be proved either in common form or *per testes*; if the proceeding is contentious, it must be proved in solemn form; unless the will is proved in some form, no grant of probate can be made merely on the consent of the parties. The only issue in a probate proceeding relates to the genuineness and due execution of the will. Though a contentious proceeding for a probate takes, under S. 83 of Probate Act, as nearly as may be, the form of a suit, an agreement or compromise, as regards the issue of genuineness of the will, if its effect is to exclude evidence in proof of the will, is not lawful within the meaning of S. 375, C.P.C., 1892. 31 C. 357=8 C.W.N. 197. G

(b) Parties actually engaged in contesting a will upon any of the grounds upon which such contests are permitted, may compromise all matters of difference arising out of such contest and allow the disputed will to be established, and such agreements when fairly made will be enforced. *In re Gracelon*, 43 Am. St. Rep. 134, cited in 14 C.W.N. 967 (970). H

(c) So, Where on the executors propounding a will, the widows of the deceased entered caveat, but before the case came on for hearing, the parties settled their differences and the caveators withdrew their objections on the executors undertaking *inter alia* to pay them a fixed monthly allowance although the will provided an allowance to them only out of the surplus income, held that the agreement having been entered into in order to settle a *bona fide* dispute was enforceable. 14 C.W.N. 967. I

(15) How far a compromise as to due execution of will is valid.

(a) A compromise as regards the due execution of a will, if its effect is to exclude evidence in proof of the will, is not lawful within the meaning of O. XXIII, R. 3, C.P.C., 1908, and no probate can be granted merely because the caveator consents to the grant. Such an agreement is against public policy, for its object is to exclude inquiry into the genuineness of the will which it is the duty of the Probate Court to make. 6 Ind. Cas. 912. J

(b) So when Probate has actually been revoked by the Court of first instance on the ground that the will propounded is a forgery, the parties are not entitled to bring the matter on appeal and then by compromise to obtain a reversal of the decision and a revival of the probate without any adjudication on the merits. 6 Ind. Cas. 912. K

(16) How far a compromise in a revocation proceeding is valid.

A proceeding for revocation of probate is not a suit with the meaning of O. XXIII, R. 3, C.P.C., and therefore it is not competent to the parties to adjust the matter in difference by a compromise. 6 Ind. Cas. 912. L

(17) Compromise of probate action, on whom binding.

As to this, see notes under S. 50, *supra*. M

1.—“The proceedings of the Court of the District Judge....shall....be regulated, so far as the circumstances of the case will admit, by the Code of Civil Procedure ”—(Continued).

(18) Whether a review lies in testamentary proceedings.

(a) The question was not decided, but *Sargent, J.* was of opinion that a review lies. See 5 B. 638 (641). **N**

(b) According to Messrs. Philip and Trevelyan, a person, who would not otherwise be entitled to re-open probate proceedings, might be entitled to apply for a review of judgment for any of the reasons mentioned in the C.P.C., Act V of 1908, O. 47, r. 1, Ph. & Trev. 375. **O**

(19) Non-contentious application for revocation being governed by S. 55 and not S. 83 is a miscellaneous proceeding.

(a) The section applicable to a non-contentious application for revocation of probate is S. 55 and not S. 83 of the Probate Act, and so, it is a miscellaneous proceeding and not a regular suit. 4 C.W.N. 600. **P**

(b) The costs in a proceeding for revocation of probate should be assessed as in a miscellaneous proceeding. 4 C.W.N. 603. **Q**

(20) Procedure to be followed is that in the Act and not that in the English cases.

A special procedure having been laid down in the Act, the English cases do not apply in matters of procedure. 4 B.L.R. App. 49. **R**

N.B.—See also notes under S. 83, *infra*.

(21) Limitation for application for probate or letters or administration.

(i) No law of limitation governs applications for probate or letters of administration, though long unexplained delay may throw doubt on the genuineness of the will propounded. 6 C. 707=8 C.L.R. 52; see, also, 8 M. 207; 19 C. 48. **S**

(ii) The reason for the exemption of applications for probate from the operation of the Limitation Act, probably, is, that the application for probate is in the nature of an application for permission to perform a duty created by a will or for recognition as a testamentary trustee, and the right to apply continues so long as the object of the trust exists, or any part of the trust, if really created, remains to be executed. 17 M. 379 (381). **T**

(iii) An application for probate or letters of administration is not governed by Art. 178 of Sch. II of the Limitation Act, XV of 1877, which applies only to applications under the C.P.C. 7 B. 213. **U**

(iv) The general words of Art. 178 must not be read irrespective of the latter part of the Article, which refers to the Code of Civil Procedure, and applications contemplated by that Article must be taken to mean applications under that Code. The Limitation Act does not profess to provide for all kinds of applications whatsoever. 10 A. 350 (353). **V**

(v) Art. 178 has no reference to an application by which a miscellaneous proceeding is instituted, as opposed to a regular suit, and which is not made under the Code of Civil Procedure. 4 O.C. 224 (226). **W**

(vi) See, also, 8 M. 207; 19 C. 48; 6 C. 60=6 C.L.R. 345. **X**

(22) No limitation for applications for revocation.

As to this, see notes under S. 50, *supra*. **Y**

1.—“ The proceedings of the Court of the District Judge...shall...be regulated, so far as the circumstances of the case will admit, by the Code of Civil Procedure”—(Concluded).

(23) Delay in application should be explained.

(a) Delay in making the application should be explained, as, although the law of limitation does not apply, lapse of time may be a circumstance to be taken into consideration in ascertaining whether the will is genuine. See 17 M. 379; Ph. and Trev. 393. Z

(b) In England, if three years have expired from the death of the testator, the delay is required to be explained. See I Will. Exors. 10th Ed., 234. A

(24) Delay in application for probate or for its revocation may be explained.

As to this, see notes under S. 50, *supra*. B

N.B.—See also provisions of S. 80, *infra*.

(25) No section in the Probate Act corresponding to S. 239 of the Succession Act providing for appointment of Receiver.

There is no section in the Probate and Administration Act corresponding to S. 239 of the Succession Act which provides for the appointment of a receiver to take and keep possession of the property of a deceased person until a grant of probate or letters of administration. C

(26) But the High Court can always appoint a receiver in testamentary proceedings.

Although S. 239 of the Succession Act has not been incorporated in the Probate and Administration Act, the High Court has power to appoint a receiver in a testamentary suit, under the general provisions of the C.P.C. 17 B. 388. D & E

(27) When a receiver will be appointed as against an executor or administrator in England.

A receiver may be appointed on ground of misconduct, waste, or improper disposition of the assets, or absence from jurisdiction, or bankruptcy of a sole executor or administrator, though not merely on the ground of his poverty. II Will. Exors. 10th Ed., 1615. F

(28) Chancery rule not applicable to the case of an executor of a Mahomedan.

The rule of the Court of Chancery, that a receiver will not be appointed against an executor unless gross misconduct was shown, is not applicable to the case of an executor of the will of a Mahomedan. 19 B. 83. G

(29) Power of High Court to enjoin the Administrator-General to collect and hold assets until right of succession or administration is ascertained.

As to this, see S. 18, Act II of 1874. H

(30) Power of District Judge to take charge of property of deceased persons pending report to Administrator-General.

As to this, see S. 64, Act II of 1874. I

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56. Probate of the will or letters of administration to the estate

When Probate or administration may be granted by District Judge 1.

of a deceased person may be granted by the District Judge under the seal of his Court, if it appears by a petition, verified as hereinafter mentioned, of the person applying for the same that the testator or intestate, as the case may be, had at the time of his decease a fixed place of abode, or any property, moveable or immoveable, within the jurisdiction of the Judge.

(Notes).**General.****(1) Corresponding Indian Law.**

This section corresponds to S. 240 of the Indian Succession Act, X of 1865. J

(2) Corresponding English Law.

S. 56 is based on S. 46 of the English St. 20 & 21 Vict. C. 77. K

1.—“When probate or administration may be granted by District Judge.”**(1) District Judge, definition.**

A to this, see S. 3, *supra*. L

(2) Test of jurisdiction under the section.

(a) Under S. 56 of the Probate Act, a District Judge has jurisdiction to grant probate of a will executed out of British India by a person who is not a British subject, if the testator had at the time of his death moveable or immoveable property within the jurisdiction of the Judge. 20 B. 607. M

(b) Where a person had no fixed place of residence at the time of his death, the Judge of the district in which his debts were, was held to have authority to grant a certificate under Act XXVII of 1860. 20 W. R. 286. N

(c) The District Judge of Thana was held to have jurisdiction to grant probate of a will of a Hindu woman devising immoveable property situated in Thana, though the will was executed in Bombay. 9 B. 241. O

(d) Under S. 56 of the Probate Act, a District Judge has jurisdiction to grant probate of a will executed out of British India, by a person who is not a British subject, if the testator had at the time of his death moveable or immoveable property within the jurisdiction of the Judge. 20 B. 607. P

(3) Where there is neither residence nor property within the jurisdiction, the grant may be refused.

(a) Where the deceased died without the jurisdiction of the Court and left no property at any place under its jurisdiction, except some trifling articles, the District Judge was held to have properly exercised his discretion vested in him under Ss. 56 and 57 of the Probate Act in refusing to grant letters of administration. 1 Bom. L.R. 666. Q

(b) A District Judge cannot grant letters of administration to a Parsi if the deceased had not at the time of his death a fixed place of abode or any property within his district. 17 B. 689. R

1.—“When probate or administration may be granted by District Judge”

—(Concluded).

- (c) Where the deceased did not live in, or leave goods or effects, within the limits of the Presidency of Madras, the High Court of Madras was held to have no jurisdiction to grant probate or letters of administration to his estate. The jurisdiction of the District Courts is similarly circumscribed under S. 240 of the Succession Act, corresponding to S. 56 of the Probate Act. 24 M. 120. **S**

(4) “Dwell,” “reside” and “abide,” meaning.

For a discussion of the meaning of the words, “dwell,” “reside,” and “abide,” see 14 B. 541; 7 W. R. 349. **T**

(5) Jurisdiction in applications for revocation.

As to this, see notes under S. 50, *supra*. **U**

57. When the application is made to the Judge of a district [S. 241.]

Disposal of application made to Judge of district in which deceased had no fixed abode 1.

in which the deceased had no fixed abode at the time of his death, the Judge may in his discretion refuse the application, if in his judgment it could be disposed of more justly or conveniently in another district, or, where the application is for letters of administration, grant them absolutely, or limited to the property within his own jurisdiction.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 241 of the Indian Succession Act, X of 1865, but with the words “the Judge may in his discretion refuse” in place of the words “it shall be in the discretion of the Judge to refuse” of the latter section. **Y**

1.—“Disposal of application made to Judge of district in which deceased had no fixed abode.”

When the discretion under the section does not apply,

The discretion vested in a Judge by S. 57 of the Probate Act does not extend to a case where there is no Court of concurrent jurisdiction in India to which application for probate can be made. 20 B. 607. **W**

58. Probate and letters of administration may, upon application [S. 241-A.]

Probate and letters of administration may be granted by Delegate 1.

for that purpose to any District Delegate, be granted by him in any case in which there is no contention, if it appears by petition (verified as hereinafter mentioned) that the testator or intestate, as the case may be, at the time of his death had his fixed place of abode within the jurisdiction of such Delegate.

(Notes).**General.****Corresponding Indian Law.**

This section corresponds to S. 241-A. of the Indian Succession Act, X of 1865, but with the words "had his fixed place of abode" in place of the word "resided" of the latter section. X

I.—"Probate and letters of administration may be granted by Delegate."**(1) Restricted powers of District Delegates.**

(a) By S. 58, the powers of District Delegates are restricted; they can make grants (1) only when there is no contention and (2) only when the deceased had "at the time of his death his fixed place of abode" within jurisdiction; not when his property lies there. See Majumdar, 559. X1

(b) See, also, Ss. 73, 74 and 75, *infra*. Y

(2) Contention, meaning.

As to this, see S. 73, Explanation, *infra*. Z

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59. Probate or letters of administration shall have effect over all the property, moveable or immoveable, of the deceased throughout the Province in which the same is (or are) granted,

and shall be conclusive as to the representative title against all debtors of the deceased, and all persons holding property which belongs to him,

and shall afford full indemnity to all debtors paying their debts, and all persons delivering up such property to the person to whom such probate or letters of administration shall have been granted :

Effect of unlimited probates, etc., granted by certain Courts.

Provided that probates and letters of administration granted—

(a) by a High Court, or

(b) by a District Judge, where the deceased at the time of his death had his fixed place of abode situate within the jurisdiction of such Judge, and such Judge certifies that the value of the property affected beyond the limits of the Province does not exceed ten thousand rupees, shall, unless otherwise directed by the grant, have like effect throughout the whole of British India.

(Old Acts).

Act XII of 1891 :—By this Act, the words "or are" in the 4th line of S. 59 were added.

Act VI of 1900 :—S. 47 of this Act substituted the words "Chief Court of Lower Burma" in place of the words "Court of the Recorder of Rangoon" in the proviso to the section.

Act VIII of 1903 :— S. 3 of this Act substituted the present proviso in place of the original proviso which ran as follows :—

“Provided that probates and letters of administration granted by a High Court established by Royal Charter, or by the Chief Court of the Punjab, or by the Court of the Recorder of Rangoon shall unless otherwise directed by the grant, have like effect throughout the whole of British India.

(Notes).

General.

(1) Corresponding Indian Law.

This section corresponds to S. 242 of the Indian Succession Act, X of 1865, but with the word “property” used in place of the words “property and estate” of the latter section. **A**

(2) Corresponding English Law.

S. 59 corresponds to S. 62 of the English St. 20 and 21, Vict., c. 77. **B**

(3) Scope of the section.

S. 59 points out expressly the effect which grants of probate and of letters of administration are to have over property, and the extent to which they are to be conclusive. 7 W.R. 338 (844). **C**

(4) Grants to the Administrator-General are not governed by this section.

(a) Grants of letters of administration to the Administrator-General are made to him by virtue of Act II of 1874 and are not in any way affected by the provisions of Act XIII of 1875. The form of grant should be general and unlimited. 4 C. 770=4 C.L.R. 42. **D**

(b) Before the passing of this Act, the High Court of Calcutta was held to have no power to grant letters of administration to the Attorney of the executor of a deceased in respect of assets situate in the Punjab though it can grant them to the Administrator General in respect of such assets under the Administrator-General's Act, XXIV of 1867. 1 B. L.R.O.C. 3. **E**

I.—“Conclusiveness of probate or letters of administration.”

(1) Province, definition.

As to this, see S. 3, *supra*. **F**

(2) British India, meaning.

As to this, see notes under S. 1, *supra*. **G**

(3) Probate cannot be granted of a Cutchi Memon under this section to take effect throughout India.

Cutchi Memons being Mahomedans, probate cannot be granted to a will of a Cutchi Memon testator to take effect throughout India. 6 B. 452. **H**

(4) Probate of a Hindu will has the same effect as that mentioned in the section.

The effect of the Hindu Wills Act, which makes (among others) Ss. 180 and 242 of the Succession Act applicable to Hindus, is to make the probate of the will evidence of the will against all persons interested under the will. 8 B.L.R. 208 (Decided before the amendment of the Hindu Wills Act). **I**

1.—“*Conclusiveness of probate or letters of administration*”—(Continued).

(5) Probate of a Mahomedan will—Its effect.

The effect of probate of a Mahomedan will granted under the Probate and Administration Act is limited to the effect given to it by the terms of the Act itself; see Ss. 4, 59 and 88. They cannot be applied so as to give the probate the effect of an estoppel as to the will and its contents. 33 C. 116 (F.C.). J

(6) Probate granted by the Bombay High Court is effective over property in Zanzibar.

The Indian Succession Act being made applicable to Zanzibar, probate granted by the Bombay High Court is effective over property in Zanzibar of the Bombay Presidency. 8 Bom. L.R. 725. K

(7) Probate is conclusive not only as to the representative title, but also as to the validity and contents of the will.

S. 59 while stating that the probate shall be conclusive as to the representative title, is silent as to its effect with respect to the validity and contents of the will. Its conclusive effect in the latter respect is really the consequence of the exclusive jurisdiction of the Court of Probate. 6 C. 460 (463), *Per White, J.* L

(8) Probate what it conclusively proves.

As to this, see notes under S. 12, *supra*. M

(9) Probate of what is not conclusive.

As to this, see notes under S. 12, *supra*. N

(10) No difference in the effect of probate upon real and personal property.

As to this, see notes under S. 12, *supra*. O

(11) Legal consequences of grant of probate.

As to this, see S. 12, *supra*. P

(12) Grant of Probate will not affect rights of objector.

As to this, see notes under S. 12, *supra*. Q

(13) Refusal to grant probate—Effect.

As to this, see notes under S. 12, *supra*. R

(14) Probate limited to part of estate cannot be granted, where whole estate vested in executor.

As to this, see 6 B. 460, *cited* under S. 4, *supra*. S

(15) Probate does not bar a regular suit for the construction of the will though incidentally decided in the probate proceedings.

As to this, see notes under S. 12, *supra*. T

(16) Effect of S. 41 of the Evidence Act on question of probate.

As to this, see notes under S. 12, *supra*. U

(17) Judgment of probate Court cannot be barred by judgment in proceeding *inter partes*.

As to this, see notes under S. 12, *supra*. V

(18) Grounds on which probate could be impeached in a Civil Court—Effect of S. 44 of the Evidence Act.

As to this, see notes under S. 12, *supra*. W

I.—“Conclusiveness of probate or letters of administration” —(Concluded).

(19) Grant of letters of administration, conclusive proof of grantee's representative title.

An order granting letters of administration to a person, is, under S. 41 of the Evidence Act, and S. 59 of the Probate Act conclusive proof of the representative title of the grantee against all debtors of the deceased and all persons holding property which belonged to the deceased. 25 C. 354 (369). **X**

(20) Letters of Administration whether sufficient to prove disputed will.

As to this, see notes under S. 12, *supra*. **Y**

(21) No Court other than a Court of Probate can go behind the grant.

As to this, see notes under S. 12, *supra*. **Z**

(22) When a plea of *res judicata* is effectual in a probate Court.

As to this, see notes under S. 12, *supra*. **A**

(23) Effect of probate or letters granted to Administrator-General.

As to this, see Ss. 14 and 23-A of Act II of 1874. **B**

60. (1) Where probate or letters of administration has or [S. 242-A.]

Transmission to High Courts of certificates of grants under proviso to S. 59 1. have been granted by a Court with the effect referred to in the proviso to section 59, the High Court or District Judge shall send a certificate thereof to the following Courts, namely:—

(a) when the grant has been made by a High Court, to each of the other High Courts,

(b) when the grant has been made by a District Judge, to the High Court to which such District Judge is subordinate and to each of the other High Courts.

(2) Every certificate referred to in sub-section (1) shall be to the following effect, namely:—

“I, A.B., Registrar (or as the case may be) of the High Court of Judicature at _____ (or as the case may be), hereby certify that on the _____ day of _____ the High Court of Judicature at _____ (or as the case may be) granted probate of the will (or letters of administration of the estate), of C.D., late of _____ deceased, to E. F. of _____ and G. H. of _____, and that such probate (or letters) has (or have) effect over all the property of the deceased throughout the whole of British India;”

and such certificate shall be filed by the High Court receiving the same.

(3) Where any portion of the assets has been stated by the petitioner, as hereinafter provided in section 62 and 64, to be situate within the jurisdiction of a District Judge in another Province, the Court required to send the certificate referred to in subsection (1) shall send a copy thereof to such District Judge, and such copy shall be filed by the District Judge receiving the same.

(Old Acts).

Act VIII of 1903 :—S. 3 of this Act substituted the present S. 60 in place of the original one which ran as follows :—

Whenever a grant of probate or letters of administration is made by a Court with such effect as last aforesaid, the Registrar, or such other officer as the Court making the grant appoints in this behalf, shall send to each of the other Courts empowered to make such grants, a certificate to the following effect :—

I. A.B., Registrar, [or as the case may be] of the High Court of Judicature at
[or as the case may be], hereby certify that on the
day of 188 the High Court of Judicature at
[or as the case may be] granted probate of the will [or letters of administration of the estate] of C.D., late of deceased, to E. F., of and G. H., of and
that such probate [or letters has [or have] effect over all the property of the deceased throughout the whole of British India ;
and such certificate shall be filed by the Court receiving the same."

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 242-A of the Indian Succession Act, X of 1865. C

1.—"Transmission to High Courts of certificates of grants under proviso to S. 59."

(1) High Court, definition.

As to this, see notes under S. 52, *supra*.

(2) British India, meaning.

As to this, see notes under S. 1, *supra*.

E

. 243.]

61. The application for probate or letters of administration, if made and verified in the manner hereinafter mentioned, shall be conclusive for the purpose of authorizing the grant of probate or administration, and no such grant shall be impeached by reason that the testator or intestate had no fixed place of abode or no property within the district at the time of his death, unless by a proceeding to revoke the grant if obtained by a fraud upon the Court.

Conclusiveness of application for probate or administration, if properly made and verified 1.

(Notes).

General.

(1) Corresponding Indian Law.

This section corresponds to S. 243 of the Indian Succession Act, X of 1865. **F**

(2) Corresponding English Law.

S. 61 is based on S. 47 of the English St. 20 and 21, Vict. C. 77. **G**

1.—“Conclusiveness of application for probate or administration if properly made and verified.”

(1) Scope of Ss. 61, 62 and 64.

These sections are enacted for jurisdictional and not for fiscal purposes; they are enacted for the purpose of authorizing the grant of administration and rendering it conclusive even though there might be incorrect statements or omissions in the application upon which the grant is issued, and have no reference to the valuation of the estate for the purpose of levying a Court-fee upon it. 21 B. 673 (676). **H**

(2) Where assets out of jurisdiction discovered after grant by District Judge—Procedure.

As to this, see notes under S. 64, *infra*. **I**

62. Application for probate or for letters of administration [S. 244.]
 Petition for probate¹. with the will annexed shall be made by a petition distinctly written in English or in the language in ordinary use in proceedings before the Court in which the application is made, with the will, or, in the cases mentioned in sections 24, 25 and 26, a copy, draft or statement of the contents thereof, annexed, and stating

the time of the testator's death,

that the writing annexed is his last will and testament, or as the case may be,

that it was duly executed,

the amount of assets which are likely to come to the petitioner's hands;

and, where the application is for probate, that the petitioner is the executor named in the will.

In addition to these particulars, the petition shall further state,

when the application is to the District Judge, that the deceased at the time of his death had a fixed place of abode or had some property situate within the jurisdiction of the Judge; and,

When the application is to a District Delegate, that the deceased at the time of his death had a fixed place of abode within the jurisdiction of such Delegate.

When the application is to the District Judge and any portion of the assets likely to come to the petitioner's hands is situate in another Province, the petition shall further state the amount of such assets in each Province and the District Judges within whose jurisdiction such assets are situate.

(Old Act).

Act VIII of 1903.

S. 3 of this Act added the last para to S. 62.

(Notes).

General.

(1) Corresponding Indian Law.

This section corresponds to S. 244 of the Indian Succession Act, X of 1865, but contains in addition the words "or, in the cases mentioned in sections 24, 25 and 26, a copy, draft or statement of the contents thereof." J

(2) Scope of S. 62.

As to this, see notes under S. 61, *supra*.

K

1.—"Petition for probate."

(1) District Judge, definition.

As to this, see S. 3, *supra*.

L

(2) "Due execution" of a will, what it implies.

"Due execution" of a will implies not only that the testator was in such a state of mind as to be able to authorise, and to know he was authorising, the execution of a document as his will, but also that he knew and approved of the contents of the instrument. 21 C. 279. M

(3) Presumption of due execution and attestation.

(a) In the absence of evidence to the contrary, there is a presumption, even where the witnesses do not recollect the facts attendant on the execution, that the Will was duly executed and attested. *Burgoyne v. Showler*, 1 Rob 5; *In re Puddephatt*, 2 P. & D. 97; *Cooper v. Bocket*, 3 Curt. 649; *Lloyd v. Roberts*, 12 Moo. P. C. 158; *Wright v. Sanderson*, 9 P.D. 149; *Blake v. Blake*, 7 P.D. 102. N

(b) If a Will on the face of it appears to be duly executed, the presumption is "*omnia esse rite acta*," even though there should be an attestation clause, omitting to state some essential particular. *Wright v. Sanderson*, 9 P. D. 149; *Lloyd v. Roberts*, 12 Moo. P. C. 158. O

(4) "Assets" meaning.

(a) The term "*assets*" means and includes, "property of a deceased person chargeable with and applicable to the payment of his debts and legacies." It would, therefore, include immoveable property. 25 C. 65 (73); 25 C. 54 (58). P

(b) "*Assets*" includes lease-holds, as well as cash and promissory notes. 1 M. H.C. 171 (175). Q

(5) Petition must state *all* the assets likely to come into the petitioner's hands.

A petition for letters of administration should state all the assets which are likely to come into the petitioner's hands, not only a part of them. 22 M. 345. R

1.—“*Petition for probate*”—(Concluded).

- (6) Enough if the property set out in the petition was in the possession of the deceased at time of his death.

In an application for probate, it is sufficient for the purpose of giving jurisdiction under the section, that the property alleged by the petition to have been situate within the jurisdiction of the Judge should have been in the possession of the testator at the time of his death. 4 C. L.R. 498. S

- (7) Object of the rule requiring a statement of the assets likely to come into the petitioner's hands.

The object of the rule requiring the executor to state in his application for probate the amount of assets which are likely to come to his hands, is only to furnish a basis for testing the accuracy of the subsequent inventory and accounts. 21 B. 139 (152). T

- (8) In Calcutta the petition must also contain a statement of the basis of valuation.

In Calcutta, the petition must also containing a statement containing such details as will show fully how and on what principle the value is calculated or arrived at. Rules of 1st March 1878 cited in Ph. & Trev. 384. U

- (9) In Calcutta the petition for an unlimited grant must contain an undertaking in case of discovery of other assets.

Where it is sought to obtain an unlimited grant, it must be stated in the petition, that, so far as the petitioner has been able to ascertain, there are no property and effects besides those specified as required by S. 99, (i.e., his moveable and immoveable property in each of the Provinces), and the petitioner must undertake, in case of its being afterwards found that there are other property and effects, that he will pay the Court-fee payable in respect thereof, and also in the case of letters of administration, that he will give such further bond of the nature contemplated by S. 76 with a surety or sureties as he may at any time be called on by the Registrar to give. Rule of 21st June 1875 cited in Ph. & Trev. 384. Y

- (10) Executor's petition need not contain a list of the heirs and relations of the testator.

An executor of a will is under no obligation to set out in the application for the probate a complete or any list of the heirs and relations of the testator. 7 P.R. 1902. W

- (11) Appointment of executor may be express or implied.

As to this, see notes under S. 7, *supra*. X

- (12) Application for probate may be made in *forma pauperis*.

As to this, see notes under S. 55, *supra*. Y

- (13) Nuncupative will under Hindu Law—Validity and proof.

As to this, see notes under heading “will” in S. 3, *supra*. Z

- (14) Probate may be granted of a nuncupative will.

There is nothing in the Probate or Succession Act to prevent probate being granted of a nuncupative will. 24 B. 8. A

- (15) Jurisdiction in applications for revocation.

As to this, see notes under S. 50, *supra*. B

- (16) Duty of executor or administrator to exhibit inventory and account.

As to this, see S. 98, *infra*. C

245.]

63. In cases wherein the will, copy or draft is written in any

In what cases
translation of will to
be annexed to peti-
tion 1.

language other than English, or than that in
ordinary use in proceedings before the Court,
there shall be a translation thereof annexed to the

Verification of
translation by person
other than Court
translator.

petition by a translator of the Court, if the language be one for
which a translator is appointed; or, if the will,
copy or draft be in any other language then by
any person competent to translate the same, in
which case such translation shall be verified by that person in the
following manner :—

“ I (A. B.) do declare that I read and perfectly understand the
language and character of the original, and that the above is a true
and accurate translation thereof.”

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 245 of the Indian Succession Act, X of 1865, but
with the words ‘ will, copy or draft ’ used in place of the word
“ will ” in the latter section. C1

1.—“ In what cases translation of will to be annexed to petition. ”**(1) Practice of the Calcutta High Court.**

In Calcutta, where the will is in any of the Eastern or foreign languages or
characters, there shall be a translation thereof annexed by one of the
sworn interpreters of the Court, if it be a language for which an inter-
preter is appointed, or if it be any other language, then by any person
competent to translate the same, in which case, such translation
shall be accompanied by an affidavit of the translator that he read
and perfectly understood the language and character of the original,
and that the same is a true and accurate translation. Belchamber’s
Rules., 741. D

(2) Probate where will in foreign language.

As to this, see notes under S. 5, *supra*. E

3.]

Petition for letters
of administration 1.

64. Application for letters of administration

shall be made by petition distinctly written as
aforesaid, and stating

the time and place of the deceased’s death,

the family or other relatives of the deceased, and their respec-
tive residences,

the right in which the petitioner claims,

the amount of assets which are likely to come to the peti-
tioner’s hands.

In addition to these particulars the petition shall further state, when the application is to a District Judge, that the deceased at the time of his death had a fixed place of abode or had some property situate within the jurisdiction of the Judge; and

when the application is to a District Delegate, that the deceased at the time of his death had a fixed place of abode within the jurisdiction of such Delegate.

when the application is to the District Judge and any portion of the assets likely to come to the petitioner's hands is situate in another Province, the petition shall further state the amount of such assets in each Province and the District Judges within whose jurisdiction such assets are situate.

(Old Act).

Act VIII of 1903 :—S. 3 of this Act added the last para to S. 64.

(Notes).

General.

(1) Corresponding Indian Law.

This section corresponds to S. 246 of the Indian Succession Act X of 1865. F

(2) Scope of S. 64.

As to this, see notes under S. 61, *supra*. G

I.—“Petition for letters of administration.”

(1) “Assets” meaning.

As to this, see notes under S. 62, *supra*. H

(2) Where assets out of jurisdiction discovered after grant by District Judge—Procedure.

Where, after letters of administration have been granted by a District Judge, it is found that there is property left by the deceased outside the jurisdiction of the District Judge, and it therefore becomes advisable to obtain letters of administration from the High Court, the proper course is for the grantee to apply to the District Judge to revoke the letters granted by him, and after obtaining their revocation, to apply to the High Court for a new grant. 25 A. 355=23 A.W.N. 62. See also 1 B.L.R. O.C. 19. I

(3) Before making a grant under the section Court bound to consider whether there is any estate to be administered.

(a) Under S. 64 it is no doubt not necessary for the Probate Court to decide what assets are likely to come to the hands of a Petitioner for letters of administration, but it is also the duty of the Court in granting letters of administration to consider whether there is any estate whatever to be administered. 14 C.W.N. 463=5 Ind. Cas. 395. J

1.—“*Petition for letters of administration*”—(Concluded).

(b) So where the object of the litigation appeared to be not to administer the estate of the deceased—a Hindu, who had died in 1875 and was carried by his widow in possession till 1907—, but really to obtain a declaration of heirship so as to fortify the successful party in any regular suit that may be instituted, the High Court held that no grant should be made, although objection on this ground was taken for the first time in appeal from the order of the District Court granting letters of administration. 14 C.W.N. 463 = 5 Ind. Cas. 395. K

- (4) Except under special circumstances, general letters of administration should be obtained.

As to this, see notes under S. 14, *supra*.

L

- (5) District Judge, definition.

As to this, see S. 3, *supra*.

M

S. 246.]

65. Every person applying to any of the Courts mentioned in

Additional statements in petition for probate &c 1.

the proviso to section 59 for probate of a will or letters of administration of an estate, intended to have effect throughout British India, shall state in his petition, in addition to the matters respectively required by sections 62 and 64, that to the best of his belief no application has been made to any other Court for a probate of the same will or for letters of administration of the same estate, intended to have such effect as last aforesaid,

or, where any such application has been made, the Court to which it was made, the person or persons by whom it was made, and the proceedings (if any) had thereon.

And the Court to which any application is made under the proviso to section 59 may, if it think fit, reject the same.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 246-A of the Indian Succession Act X of 1865. N

1.—“*Additional statements in petition for probate.*”

British India, definition.

As to this, see notes under S. 1, *supra*.

O

. 247.]

66. The petition for probate or letters of administration shall

Petition for probate or administration to be signed and verified 1.

in all cases be subscribed by the petitioner and his pleader, if any, and shall be verified by the petitioner in the following manner or to the like effect :—

“ I (A.B.), the petitioner in the above petition, declare that what is stated therein is true to the best of my information and belief.”

(Notes).

General.

(1) Corresponding Indian Law.

This section corresponds to S. 247 of the Indian Succession Act X of 1865. **P**

(2) Analogous provision in the C. P. C.

Compare S. 64 with Order 6, Rules 14 and 15 (1) of the C. P. C. (1908). **Q**

I.—“Petition for probate or administration to be signed and verified.”

(1) Verification, object.

The object of verification is to secure good faith in the averments of the party, as by the verification of a plaint, the plaintiff makes its statements his own. *Hukam Chaud, cited in Majumdar, 569.* **R**

(2) Administrator-General may verify by his signature only.

(a) A petition by the Administrator-General for letters of administration is sufficiently verified by his simple signature under S. 12 of Act II of 1874, which Act does away with the requirements of the rule so far as proof of the statements as to assets is concerned. 20 C. 879. **S**

(b) The Administrator-General, as a public officer, by S. 12 of Act II of 1874, is exempted from verifying otherwise than by his signature any petition presented by him under the provisions of the Act. 26 C. 404 (406) = 3 C.W.N. 298. **T**

(c) See S. 12, Act II of 1874. **U**

67. Where the application is for probate, or for letters of administration with the will annexed, the petition [S. 242.]

Verification of petition for probate by one witness to will 1. shall also be verified by at least one of the witnesses to the will (when procurable), in the manner or to the effect following :—

“ I (*C. D.*), one of the witnesses to the last will and testament of the testator mentioned in the above petition, declare that I was present and saw the said testator affix his signature (*or mark*) thereto (*as the case may be*) (*or that the said testator acknowledged the writing annexed to the above petition to be his last will and testament in my presence.*)”

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 248 of the Indian Succession Act X of 1865. **Y**

I.—“Verification of petition for probate by one witness to will.”

No provision when attesting witness procurable.

There is no provision in the Act as to what is to be done when an attesting witness is not procurable, and the required verification cannot be made. *Majumdar 570.* **W**

1.—“Verification of petition for probate by one witness to will”—(Cld.).**(2) When affidavit of attesting witness may be used.**

In a suit for revocation of probate on the ground of undue influence and incapacity, the affidavit of one of the attesting witnesses who could not be found and which had been made 8 years before, was allowed to be read as evidence of execution and testamentary capacity.
Gornall v. Mason, 12 P.D. 142. X

(3) When affidavit of person acquainted with the signature may be used.

In Calcutta, if there is no proper attestation clause, the execution of the will must be proved by affidavit of person acquainted with the signatures on the will. See *Hend*. 3rd Edition, 312 and see cases therein cited. Y

N.B.—See also notes under S. 69, *infra*.

[S. 249.] **68.** If any petition or declaration which is hereby required to be verified contains any averment which the person making the verification knows or believes to be false, such person shall be subject to punishment according to the provisions of the law for the time being in force for the punishment of giving or fabricating false evidence.

(Notes).**General.****Corresponding Indian Law.**

This section corresponds to S. 249 of the Indian Succession Act X of 1865. Z

1.—“Punishment for false averment in petition or declaration.”**Illustrative case.**

For a case in which sanction was accorded for prosecution for offences under Ss. 196 and 211, I.P.C., committed in the course of probate proceedings, see 26 B. 785. A

[S. 250.] District Judge may examine petitioner in person, **69.** In all cases it shall be lawful for the District Judge or District Delegate, if he thinks fit,

to examine the petitioner in person upon oath, and also

to require further evidence of the due execution of the will¹,
 require further or the right of the petitioner to the letters of administration, as the case may be, and
 evidence,

to issue citations calling upon all persons claiming to have any interest in the estate of the deceased² to come and see the proceedings³ before the grant of probate or letters of administration.
 and issue citations to inspect proceedings.

The citation shall be fixed up in some conspicuous part of the the Court-house, and also in the office of the Collector of the district, and otherwise published or made known in such manner as the Judge or Delegate issuing the same may direct.

(Where any portion of the assets has been stated by the petitioner to be situate within the jurisdiction of a District Judge in another Province, the District Judge issuing the same shall cause a copy of the citation to be sent to such other District Judge, who shall publish the same in the same manner as if it were a citation issued by himself and shall certify such publication to the District Judge who issued the citation.)

(Old Act).

Act VIII of 1903:—S. 3 of this Act added the last para to S. 69.

(Notes).

General.

(1) Corresponding Indian Law.

This section corresponds to S. 250 of the Indian Succession Act, X of 1865. B.

(2) Corresponding English Law.

S. 69 corresponds to S. 61 of the English. St. 20 and 21 Vict. C 77. C.

Proof in Common and Solemn form in English Law.

(1) Proof in *Common form*, what is.

A will is proved in *Common form*, when the executor presents it before the Judge, and in the absence of, and without citing, the parties interested produces witnesses to prove the same. The will is proved simply on the oath or credit of the party propounding it. Majumdar, 573, citing Shephard's Touchstone. D.

(2) Proof in *Solemn form*, what is.

A will is proved in *Solemn form* or *per testes*, when it is proved in the presence of such as may pretend any interest in the goods of the deceased, or at least in their absence, after they have been lawfully summoned to see such will proved if they think good. (*Ibid.*) E.

(3) Difference between the two forms of proof in English Law.

In English law the difference between the *Common form* and the *Solemn form* consists in this, that the executor of the will proved in *Common form* may, at any time within 30 years, be compelled, by a person having an interest, to prove it *per testes* in *Solemn form* though not when already proved in *Solemn form*. I Will. Exors., 10th Ed., 242. F.

(4) Probate granted on proof in *solemn form* is irrevocable.

As to this, see notes under S. 50, *supra*. G.

General — (Concluded).

(5) Executor may himself prove in *Solemn form* in the first instance.

The executor himself, may, and often does in prudence, prove the will in *Solemn form* in the first instance, if there is any doubt as to the validity of the will, or possibility of any future opposition. (*Ibid.*), 243. H

(6) Risks of Executor omitting to prove in *Solemn form* in the first instance.

An executor, who omits to prove the will in *Solemn form*, in the first instance, incurs the risk, should he at a later period be called upon to establish the will, of the loss of material evidence by the removal, by death or otherwise, of material witnesses. And should the probate be revoked, he is liable to account for legacies paid under it, and his sole protection is his right to be recouped by the recipients of such payments. Trist and Cooté, 13th Ed., 363. I

(7) Acquiescence and receipt of legacy is no bar to citing executor to prove in *Solemn form*.

(a) Even a next-of-kin who has acquiesced and received a legacy may compel an executor to prove the will in *Solemn form*, provided such next-of-kin brings his legacy into Court. *Bell v. Armstrong*, 1 Add. 370; *Merrymweather v. Turner*, 3 Curt. 802; cited in I Will. Exors., 10th Ed., 244—5. J

(b) See, also, notes under S. 50, *supra*. K

(8) Executor who has proved in *Common form* may be cited to prove in *Solemn form*.

As to this, see notes under S. 50, *supra*. L

(9) Where executor who has proved in *Common form* is cited to prove in *Solemn form*—Procedure.

Where an executor has proved the will in *Common form*, a party desirous of putting him to proof in *Solemn form* commences an action for revocation, having first cited the executor to bring in the probate. If the executor desires to sustain the Will, he must either plead and propound it in the action for revocation, or he must commence an action himself to obtain proof in *Solemn form*, I Will. Exors., 10th Ed., 243 (c). M

1.—“Require further evidence of the due execution of the will.”

(1) Proof of execution of Will required before grant of probate or letters of administration.

As to this, see notes under S. 19, *supra*. N

(2) In non-contentious cases, *prima facie* proof of execution of will is sufficient for a grant of probate.

Where an application for probate is unopposed, *prima facie* proof of the execution of the will is sufficient to warrant the grant of probate, it being of importance that the testator's estate should be represented as speedily as possible, and the grant being not irrevocable. 7 C.L.R. 387; see, also, 23 W.R. 103; 1 C.L.R. 362; 9 B. 241. O

1.—“Require further evidence of the due execution of the will”

—(Continued).

(3) In contentions cases, what the Court should consider.

In a case where a will is contested, the Court is bound to consider, not only whether the alleged will was executed by the testator, but whether the will was valid or invalid, and whether probate of the will ought to be granted. Every consideration which ought to induce the Court to refuse probate of the will must be taken into account. 6 C. L.R. 176. P

(4) Duty of Court in granting probate or letters of administration.

It is the duty of the Court before it grants probate or letters of administration with a will annexed, to satisfy itself as best it can, that the will was duly executed and attested, that the testator understood its contents and intended the dispositions made thereunder, and was capable of exercising a sound judgment with regard thereto, that he was of sound and disposing mind, and was not incapacitated by minority, and that the making of the will was not caused by fraud, importunity or coercion. Ph. & Trev., 391. Q

(5) Proof of testator's knowledge and approval of the will how far necessary for the grant of probate.

(a) For a grant of probate, proof of execution and of the consciousness of a testator is insufficient. It should be further shown that he knew of and understood the contents of the documents which he signed. 22 M. 345. R

(b) Probate is rightly granted where the Judge believes the witnesses who speak to the execution of the Will and the disposing mind of the testator. The rule in *Tyrrell v. Painton* (1894) p. 151 requiring proof that the testator actually knew and approved the contents of the Will does not apply unless surrounding circumstances excite suspicion. 27 C. 521 (P.C.) = 4 C.W.N. 501. S

(c) Where the defendant claimed the property in dispute under the Will of a Hindu widow, but kept back the evidence which would have clearly established that the mark purporting to be made by the widow, was really made by her or at her own desire, and that at the time of the execution the nature and contents of the document were well known to her, the Court refused to act upon it. 16 B. 229, referring to *Hastilow v. Stobie*, L.R. 1 P. and D. 64; *Pearson v. Pearson*, L.R. 2 P. and D. 451; *Morrill v. Douglas*, L.R. 3 P. and D. 1. T

(d) *Semle*:—Where it was proved that a will was prepared according to the testator's instructions by the person entrusted with its preparation, who moreover was fully conversant with the testator's affairs and was apparently on intimate terms with him, so that the testator would have ample reason for believing that the will placed before him for signature was drawn up in accordance with his instructions, it should be considered his will if he set his hand to it, and it would not be necessary to prove that at the time he was capable of understanding all its provisions. 13 C.W.N. 1128 = 3 Ind. Cas. 787. U

1.—“Require further evidence of the due execution of the will”

—(Continued).

(6) Burden of proof of testator's capacity.

- (a) In probate suits, the *ultimate* burden of proving testamentary capacity rests on the party propounding the will. *Cleave v. Cleave*, L.R. 1 P. and D. 657; *Sadler v. Sadler*, 3 C.B.N.S. 87 And *a fortiori* when it appears that the testator was subject to delusions. *Smee v. Smee*, 5 P.D. 84; and see *Hope v. Campbell*, 1899, A.C. 1. **Y**
- (b) The *onus probandi* lies in every case upon the party propounding a will and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. 23 A. 472 (475). **W**
- (c) As to testamentary capability of a person who was alleged to have executed his will, the Courts below differed. The case was that the will had been signed for the testator in his presence by another person authorised by him and that he was of sound and disposing mind though unable to write his name. But on the weight of affirmative evidence tending to show want of capacity in the testator, it was held that the proponent had not discharged the burden of proving capacity. 25 C. 824 = 2 C.W.N. 321 (P.C.). **X**
- (d) If the allegation is that the testator was incapable of making a will or that pressure was put upon him, it is for the person making such allegation to make it out. But if the testator was in a sound state of body and mind, the presumption is that he executed the will without coercion or undue influence. 11 C.W.N. 824 (826); 25 C. 824 (P.C.) referred to. **Y**
- (e) Where, after executing a will, a testatrix, subsequently became insane, and shortly before her death the will was found to be mutilated, it was held that the *onus* was upon those who alleged a revocation to show that, at the time of the mutilation, the testatrix was sane. *Harris v. Berral*, 1 Sw. and Tr. 153. **Z**
- (f) The burden of proving testamentary incapacity rests upon the person who attempts to invalidate what, on its face, purports to be a legal act. Sanity will be presumed till the contrary is shown, *Groom v. Thomas*, 2 Hagg. 484, cited in 1 Will. Exors., 10th Edn., p. 14. **A**
- (g) The burden of proof is upon him who challenges the will, 19 C. 444 (P.C.) **B**
- (h) The High Court considering that testator was incapable by reason of illness of signing the Will as firmly as it purported to be signed, found that signatures were not genuine, and reversed the decree of the first Court. On appeal, there was no view of the signatures, but the evidence was found not to warrant the conclusion and the evidence of defendant was not sufficient to destroy petitioner's case. 19 C. 65 (P.C.). **C**
- (i) A Judge who decides in favour of a disputed Will in a case of questioned capacity of a dying man, must apply his mind not simply to the execution in fact of a Will, but he must be careful to see that the jealous requisitions of the law as to the proof of acts of persons done in *extremis* are fully complied with. *Per Lord Chelmsford* in 10 M.I.A. 429 (436, 437). **D**
- (j) That speculative theory illustrates the danger of deriving inferences of fact from medical books and judicial *dicta*, instead of depending upon the facts established by the evidence in the case. 23 C. 1 (24) (P.C.) = 22 I.A. 171. **E**

1.—“Require further evidence of the due execution of the will”

—(Continued).

- (k) On a question of fact raised in 1887 whether an alleged testator had or had not been able to execute his Will as he was said to have done during his last illness, the judgment of the District Court in the affirmative was restored. The judgment of the High Court which would have revoked the probate of 1882 was reversed upon consideration of conflicting evidence as to mental capacity of testator and as to genuineness of his signature. 21 C. 1 (P.C.). **F**
- (l) “Due execution of a Will” implies not only that the testator was in such a state of mind as to be able to authorise and to know he was authorising, the execution of a document as his Will, but also that he knew and approved of the contents of the instrument, and in such cases of disputed execution the Judge should consider and express an opinion on both these questions. 21 C. 279 (*on appeal* 25 C. 824, (P.C.). **G**
- (m) To outweigh strong and satisfactory evidence of due execution of a Will, evidence of improbability of execution should be cogent and clearly made out. 22 C. 519=22 I.A. 12 (P.C.). **H**
- (n) Ordinarily, proof of execution of the Will is enough. But, where the mental capacity of the testator is challenged by evidence which shows that it is, to say the least, very doubtful whether his state of mind was such that he could have “duly executed” the Will as he is alleged to have done, the Court ought to find whether upon the evidence the testator was of sound disposing mind and did know and approve of the contents of the Will. 21 C. 279 (*on appeal* 25 C. 824) (P.C.). **I**
- (o) It is not enough for witness to say that they saw the testator sign the Will and that he was in his senses. It must also be proved that he understood the contents of the paper to which he was putting his signature, and for this purpose it should be shown that the Will, if not written by himself, was read over to him. 22 M. 346. (345). **J**
- (7) **Burden of proof of genuineness of will.**
- (a) The *onus* was on the defendants who set up the will to prove that the Will was genuine, and not on the plaintiffs, who impeached it, to show it was a forgery. The fact that the plaintiffs omitted to give any evidence that the Will was forged, though they asserted that “they would prove it to be spurious, if necessary,” raised no presumption of the genuineness of the Will. 23 A. 405=5 C.W.N. 895. **K**
- (b) So, where the defendants (widow and sister-in law of the deceased) set up a Will under which they alleged they took all the property of the testator absolutely, whereupon the plaintiffs, as next reversioners, sued for a declaration that the Will was not genuine, and that the alleged testator died intestate, *held* the *onus* was on defendants to prove that the Will was genuine, and not upon plaintiff to show that it was a forgery. 23 A. 405=5 C.W.N. 895. **L**
- (8) **All evidence should be produced to prove execution of will.**
- It is incumbent on persons propounding a will for the purpose of obtaining probate or letters of administration under the Hindu Wills Act to produce all the evidence which the circumstances of the case indicate as proper and necessary to prove the execution of the will. 10 C.L.R. 550. **M**

1.—“Require further evidence of the due execution of the will”

—(Continued).

(9) What evidence ordinarily sufficient.

In an ordinary case, evidence which is precise enough on main points of execution and signature, and exhibits no signal discrepancies is adequate. Ph. & Trev. 393. N

(10) Proof of execution—Nature of evidence required.

(a) In cases governed by the Succession Act and the Hindu Wills Act, the will cannot be admitted in evidence, until one attesting witness at least has given evidence for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court, and capable of giving evidence. See S. 68, Indian Evidence Act I of 1872. O

(b) If no such attesting witness can be found, or if the will purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the alleged testator is in his handwriting. See S. 69, Indian Evidence Act I of 1872. P

(c) If the attesting witness denies or does not recollect the execution, the execution of the will may be proved by other evidence. See S. 71, Indian Evidence Act I of 1872. Q

(11) Affirmative evidence of attesting witnesses not necessary.

(a) Although a party who is put to proof of a will must examine the attesting witnesses, it is not absolutely necessary for the validity of a Will to have their positive affirmative testimony that the Will was actually signed or acknowledged in their presence, before they subscribed. *Blake v. Knight*, 3 Curt. 547; *Gregory v. Queen's Proctor*, 4 Notes of Cas. 620; *Thompson v. Hall*, 2 Rob. 426. R

(b) On an application for probate, the writer of the Will deposed that he had signed the Will before the testator signed and that the testator signed immediately after him. One of the witnesses said that he signed the Will after the testator personally acknowledged his signature to it, and that when he signed other witnesses' names were on the Will. Of the other witnesses, three were proved to have been dead, and the remaining witness was not examined, but his signature as well as the signatures of the witnesses who were dead were proved. But there was no evidence that the testator had acknowledged his signature to these witnesses or that the Will was otherwise properly attested by a second witness. Held that strict affirmative proof of due attestation is not absolutely necessary in cases of this class; and if the circumstances are such as to warrant the Court in reasonably concluding from those circumstances that the Will has been duly attested, probate may be granted; and that upon the whole evidence, it could reasonably be concluded that the will had been duly attested in accordance with law. 4 C.W.N. 204, *folly*. *Wright v. Sanderson*, L.R. 9 P.D. 149. S

1.—“Require further evidence of the due execution of the will”

—(Continued).

- (12) Where the attesting witnesses contradict each other, or give false evidence, Court may resort to extrinsic evidence.

- (a) Even where both the attesting witnesses state facts showing that the Will was not duly executed, the Court may conclude from other evidence as well as from the facts and the circumstances which the attesting witnesses themselves state, that their memory fails them, and admit the Will to probate. *Kooper v. Bocckett*, 4 Moo.P.C. 419. T
- (b) Where the attesting witnesses depose contrary to each other, the Court is not thereby bound to pronounce the Will invalid; but may either examine other witnesses who were present at the execution though they did not subscribe the Will, or may, upon the mere circumstances give credence to the affirmative rather than to the negative testimony. *Chambers v. Queen's Proctor*, 2 Curt. 433; *Wright v. Rogers*, 1 P. & D. 678. U
- (c) The mere fact of an attesting witness to a Will repudiating his signature does not invalidate a Will, if it can be proved by the evidence of other witnesses of a reliable character that he has given false evidence. 22 W.R. 189. Y

- (13) Presumption as to execution of wills.

- (a) “On proof of the signature of the deceased, he will be presumed to have known and approved of the contents and effect of the instrument he has signed, such knowledge and approval being essential to the validity of the will.” *Billingshurst v. Vickers*, 1 Phillim 191; *Hastilow v. Stobie*, L.R. 1 P. & D. 64; Tay. Evid. 10th Edn., S. 160, p. 156. W
- (b) But this presumption is liable to be rebutted by showing any suspicious circumstances. *Von Stentz v. Comyn*, 12 Ir. Eq. R. 622 (642). X
- (c) Thus, in the following cases, a more rigid investigation will take place, and probate will generally not be granted, unless the Court be satisfied by evidence that the paper propounded does really express the true will of the deceased.—
- (i) Where the testator was unable to read from want of education. *Barton v. Robins*, 8 Phillam, 455 (n).
- (ii) Where, owing to bodily infirmity, he was not able to read. (*Ibid.*)
- (iii) Where his capacity at the time of executing the instrument was a matter of doubt. *Ingram v. Wyatt*, 1828, 1 Hagg., Ecc., 384.
- (iv) Where a party, who is materially benefited by the will, prepared it or conducted its execution, or has been in a position calculated to exercise undue influence. *Mitchell v. Thomas*, 6 Moo. P.C. 187; cited in Tay. Evi. 10th Edn., S. 160, p. 157.
- (v) Where the instrument itself is not consonant to the testator's natural affections and moral duties. *Prinsep v. Dyce Sombre*, 10 Moo. P.C. 285; Tay. Evi. 10th Edn., S. 160, p. 157. Y

N.B.—In all the above cases, the *onus* of proving testamentary capacity is on the person relying on the will, and the evidence must be sufficient to prove affirmatively that the testator was of sound mind when he executed it. *Symes v. Green*, 1 Sw. & Tr. 401; Tay. Evi. 10th Edn., S. 160, p. 157.

1.—“Require further evidence of the due execution of the will”

—(Continued).

(d) Where proof can be furnished that, prior to the execution of a will by a competent testator, it was read over to him, or otherwise brought specially to his notice, the Court will, in the absence of fraud, not only infer, *prima facie*, that he approved of the contents, but will recognise a conclusive presumption to that effect. *Tay. Ev.*, 10th Edn., S. 161, p. 158. **A**

(e) If there has been no fraud, coercion or undue influence, and it be proved that the testator was of sound mind, memory and understanding, and that the will was read over to him, or that he read it to himself it must be presumed that he knew and approved of the contents, and such knowledge and approval will be held to extend to every part of the will. *Atter v. Atkinson*, L.R. 1 P. & D. 665; *Goodacre v. Smith*, L.R. 1 P. & D. 359; *Harter v. Harter*, L.R. 3 P. & D. 11, 22; *Guardhouse v. Blackburn*, L.R. 1 P. & D. 109. **B**

(f) In the absence of direct proof, when several sheets of paper, constituting a connected disposal of property, are found together, the last only being duly signed and attested as a will, it will (even in spite of partial inconsistencies in some of its provisions) be presumed that each of the sheets so found formed a part of the will at the time of the execution. *Marsh v. Marsh*, 30 L.J. P. M. 77; *Tay. Ev.*, 10th Edn., S. 162, p. 158. **C**

(g) But, where a will consisted of four sheets of paper of which the second was of a different colour and size from the rest, bore no attestation, though signed by the testator, and contained a bequest to a child who was born subsequently to the date at which the will was proved to have been actually executed, *held* that probate must be refused. 29 C. 311. **D**

(14) Facts in favour of execution of the will.

(a) The fact that soon after its execution the will was proved in Court after the ordinary notifications, is a circumstance in its favour. (*Ibid.*)

(b) A failure of the case made as to the forgery of will will also support the will. See 12 M.L.A. 81, *cited in Ibid.*

(c) The circumstance that the person putting forward the will has no interest thereunder is also in its favour. (*Ibid.*) **E**

(15) Nature of provisions, how far material.

The reasonable nature of the provisions of the will is always material element from its bearing on the probabilities of the case. *Ph. and Trev.* 391 *citing* 19 C. at 72=18 I.A. at 137. **F**

(16) Where will *inofficious*, stricter proof required.

If the will disinherits an heir, the Court will require more convincing proof and a stricter inquiry into the circumstances than in the case where due provision is made in the will for the heir. See 24 W.R.C.R. 162; 6 C.L.R. 176; 10 W.R.C.R. 32; *Ph. and Trev.* 392. **G**

(17) Endorsement of acknowledgment before Registrar does not dispense with proof of will.

The fact that a contested will bears an endorsement stating that it was acknowledged by the testator before the Registrar, does not warrant a judge in granting probate without any other evidence in support of the will, even though the caveator does not produce any evidence to impeach the will. 1 C.L.R. 362. **H**

1.—“Require further evidence of the due execution of the will”

—(Concluded).

(18) Caveator's refusal to answer question does not dispense with proof of will.

The caveator's refusal to answer a question does not justify the Court in dispensing with the proof of the will set up and granting an application for probate. 9 B. 241. I

(19) Judge cannot reject an unopposed application for probate merely upon internal evidence in the will.

(a) Where an application for probate was unopposed, although a notice in the nature of a citation had been issued to the testator's widow, the Judge was held not to have been justified in rejecting the application merely upon internal evidence contained in the will. 23 W.R. 103. J

(b) For a case in which, there being adequate evidence for the proof of the *factum* of a will, the internal improbabilities in the will were held not sufficient to discredit it. See 12 M.I.A. 81=1 B.L.R. 26=10 W.R. 35 (P.C.). K

(20) Recognition by family—Effect.

The fact that for a long period the will has been recognised and acted upon by the family raises a strong presumption in its favour. See 14 M.I.A. 67; 12 M.I.A. 81, *cited* in Ph. and Trev. 394. L

(21) Presumption in case of an old will acted upon for a long time.

For —, see 14 M.I.A. 67=7 B.L.R. 216=15 W.R. (P.C.) 41. M

(22) Court should not in *bona fide* applications for probate on Letters of Administration, consider questions of title or disposing power.

As to this, see notes under S. 12, *supra*. N

(23) In application for letters of administration the title to property will not be determined.

As to this, see notes under S. 14, *supra*. O

(24) Duty of appellate Court to give weight to the opinion of the trying Judge.

As to this, see 21 C at 283, 284. P

(25) What is not a ground for refusing probate is not a ground for revoking it.

As to this, see notes under S. 50, *supra*. Q

(26) District Judge, definition.

As to this, see S. 3, *supra*. R

2.—“All persons claiming to have any interest in the estate of the deceased.”

(1) Foundation of title to be party to a probate action.

(a) The foundation of title to be party to a probate or administration action, is interest. *Crispin v. Doglioni*, 2 Sw. and Tr. 17; *Kipping v. Ash*, 1 Rob. 270. S

(b) A person who seeks to question a will must prove an interest to entitle him to a *locus standi* in Court. 2 N.W.P.H.C.R. 268 (274). T

2.—“All persons claiming to have any interest in the estate of the deceased”—(Continued).

(2) Party propounding entitled to call on objector to show his interest.

Before a person can be permitted to contest a will, the party propounding has a right to call on him to show that he has some interest. *Hingston v. Tucker*, 2 Sw. and Tr. 596 cited in 1 Will. Exors. 10th Ed., 245. See, also, 10 C.L.J. 263=3 Ind. Cas. 178. U

(3) When two persons oppose a will, one cannot call on the other to show his interest.

But when two persons oppose a will, one cannot call upon the other to propound his interest. (*Ibid.*) Y

(4) Trial of issue as to interest of objector.

As to this, see notes under S. 50, *supra*. W

(5) Objection of want of interest must be taken at the first hearing.

As to this, see notes under S. 50, *supra*. X

(6) What interest is sufficient.

Any interest, however slight, and even the bare possibility of an interest, is sufficient to entitle a party to oppose a will. 1 Will. Exors., 10th Ed., 245—246; see, also, 10 C.L.J. 263=3 Ind. Cas. 178. Y

(7) “Persons claiming to have any interest in the estate of the deceased,” what it signifies.

(a) The term “property” in “persons claiming to have any interest in the estate of the deceased,” does not necessarily refer to any particular property, but to the claim of any person to succeed by inheritance or otherwise to any portion of the estate of the deceased by reason of an interest, not an adverse title to the testator to any particular property but in the estate itself, whatever that may consist of. 17 C. 48 (52). Z

(b) The words “claiming to have any interest in the estate of the deceased” in S. 69 of the Probate Act mean “claiming to have any interest in the property left by the deceased.” 28 C. 441. A

(c) Any person who can show that he is entitled to maintain a suit in respect of property over which probate would have effect under S. 59, *supra*, has sufficient interest to entitle him to file a *caveat* and oppose the grant. *Per Field, J.* in 6 C. 460. B

A.—Persons held to have a caveatable interest.

(1) Creditor with grant of administration.

(a) A creditor cannot dispute the validity of a will, unless he has had a grant of administration to him in which case he may oppose the will. *Burroughs v. Griffiths*, 1 Cas. temp. Lee, 544; *Menzies v. Pulbrook*, 2 Curt. 845; *Das v. Chisman*, 1 Phillim 159, cited in 1 Will. Exors. 10th Ed., 246; see, also, *Elme v. Da Costa*, 1 Phill. 178, *Norman v. Bourne*, 1 Phill. 160 (n). C

(b) Under the Indian Succession Act as made applicable by the Hindu Wills Act, the creditors of a testator's heir, are not parties having any interest in the estate of the deceased, and so not entitled to oppose the grant of probate. 2 C. 208=25 W.R. 489. D

2.—“All persons claiming to have any interest in the estate of the deceased”—(Continued).

A.—Persons held to have a caveatable interest—(Concluded). D

(ii) Mortgagee.

- (a) But persons having an interest in the immoveable property of the testator, such as a mortgagee of a person, who, if the testator had left no will, would be entitled to create the mortgage, or an attaching creditor, as distinguished from a simple creditor, of such a person, would have such an interest in the property of the testator, as to entitle them to enter *caveat* and oppose the grant of probate. 6 C. 460 (461). E
- (b) Where, immediately after a mortgagee attached the mortgaged property and obtained an order for sale, the mortgagor's wife applied for probate of the will of the mortgagor's mother, the mortgaged property being included in the will, *held*, the mortgagee was entitled to enter a *caveat* against the grant of probate, on the allegation that the will was a forgery and was got up by the mortgagor to save the property from being sold in execution. 10 C. 413. F

(iii) Attaching creditor—(doubtful).

It is highly doubtful whether an attaching creditor can oppose the grant of probate, at least in a case which is not founded on the ground that the probate has been obtained in fraud of creditors. 10 C. 19 (28) (P.C.)=10 I.A. 80=13 C.L.R. 314. G

(iv) Hindu reversioner.

- (a) A Hindu reversioner is entitled to oppose the grant of probate. So, where a Hindu dies leaving a widow and a daughter, the daughter has sufficient interest to entitle her to be made a party to an application for probate and to oppose the grant of probate. 21 C. 539. H
- (b) Although a reversioner under the Hindu Law has no present alienable interest in the property left by the deceased, he is substantially interested in the protection or devolution of the estate, and as such is entitled to appear and be heard in a probate proceeding. 10 C.L.J. 263=3 Ind. Cas. 178. I

(v) Judgment-creditor of the heir.

A judgment-creditor of a brother of the deceased whose natural heirs are his brothers, is a person claiming an interest in the estate of the deceased, and as such, has a *locus standi* in opposing the grant of probate of the will of the deceased, on the ground of fraud; for, but for the will, which has been set up, he, in execution of his decree, could have attached the share of the judgment-debtor in that property. 28 C. 441, referring to 6 C. 429; 10 C. 19. J

(vi) Person interested in a former will which has been proved.

Proof of a former will of the testator, in which a certain person is interested, is sufficient to entitle that person to contest a suit brought to obtain probate of a later will. 17 M. 373. K

(vii) Executor of a prior will.

The executor of the will of a testator is, when a later will is set up, entitled to call upon the executor of such will to prove in *solemn form*, and to cross-examine the witnesses in support of that will. See 25 C. 553 (554): *Critchell v. Critchell*, 3 Sw. & Tr. 41; *Boston v. Fox*, 4 Sw. & Tr. 199. L

(viii) Administrator with the will annexed.

And what applies to an executor applies to an administrator *cum testamento annexo* in this respect. Trist and Coote, Prob. Prac., 13th Ed., 509. M

2.—“All persons claiming to have any interest in the estate of the deceased”—(Concluded).

B.—Persons held not to have a caveatable interest.

(i) Person claiming outside and independent of the will.

Persons claiming outside and independent of the will have no interest in the estate of the testator, within the meaning of S. 69 of the Probate Act and have no right to intervene and challenge the will set up. 1 C.L.J. 258. M1

(ii) Person disputing right of testator to deal with the property.

A person, disputing the right of a deceased testator to deal with certain property as his own, cannot be properly regarded as having such an interest in the estate of the deceased as to entitle him to come in and oppose the grant of probate. His action is rather that of one claiming to have an adverse interest. 17 C. 48 (52). N

(iii) Person claiming adversely to the testator.

The provisions of S. 81 of the Probate Act and S. 250 of the Succession Act are that the interest which entitles a person to put in a caveat must be an interest, in the estate of the deceased person, i.e. there should be no dispute whatever to the title of the deceased to the estate, but that the person who wishes to come in as cavator must show some interest in that estate derived from the deceased by inheritance or otherwise and not adversely to the testator. 12 Bom. L. R. 366 *following* 17 C. 48. O

(iv) Person, not next-of-kin nor interested in the estate.

A person who is not the next-of-kin, and who has no interest in the estate of a testator, has no right to oppose the grant of the probate, or dispute the validity of the will. 15 W.R. 351. P

(v) Illegitimate son of Sudra in Bengal.

The illegitimate son of a Sudra in Bengal being, like a Hindu widow, entitled only to maintenance, it was *held* that he had not sufficient interest to oppose the grant of probate of his alleged father's will. 2 C.W.N. colvi. Q

(vi) Sister and nephew's widow of prostitute woman.

(a) On an application for probate of the will of a prostitute woman, it was held that her sister and the widow of her sister's son, not being entitled to inherit, had no caveatable interest. 1 C.W.N. cxiv. R

(b) See also cases *cited* under S. 23, *supra*. S

3.—“To come and see the proceedings.”

(1) Citation, meaning.

As to this, see notes under S. 16, *supra*. T

(2) Purpose of citation.

A citation answers two purposes : it either compels a representation to be taken by those who are primarily entitled to it, or where they do not take it, the process provides a substitute for a voluntary renunciation on their part. I Will. Exors., 10th Ed., 228 : Trist. and Coote, 13th Ed., 231. U

3.—“To come and see the proceedings”—(Continued).

(3) Citations, general and special.

Citations are either *general* or *special*. A citation is *general*, when it calls upon all persons (without naming any particular person) claiming interest to appear or to do what the Court directs; it is *special* when addressed to any particular person or persons by name. Majumdar 580. **Y**

(4) Section vests the Judge with full discretion as to issue of citations.

S. 69 vests the District Judge with full discretion as to issue of citations, which should be exercised with proper care. S C. 570 (576) = 10 C.L.R. 409. **W**

(5) Party citing must possess the will or have it filed.

Before any citation can issue in respect of a will, the party citing must have previously obtained possession of the will or have it filed. Trist & Coote, 13th Ed., 232. **X**

(6) Citation or consent required of all entitled to the administration.

Whenever a party has a right to the administration, the Court always requires that he be cited or consent. *In bonis* Barker, 1 Curt. 592; *In bonis* Keene, 1 Sw. & Tr. 267; *Pegg v. Chamberlain*, 1 Sw. & Tr. 528. **Y**

(7) Citation necessary against heir-at-law.

Citation should be issued against an heir-at-law, even if he is already before the Court in another character. *Lister v. Smith*, 3 Sw. & Tr. 53. **Z**

(8) Special citations necessary for persons directly affected by the will.

In every case in which probate of a Hindu Will is asked, a special citation ought to be served upon those persons whose interests are directly affected by the will. The practice of a mere general citation in all cases is one which may tend to encourage fraud, and the fabrication and propounding of forged wills. S C. 570 (575) = 10 C.L.R. 409. **A**

(9) Case where a special citation was directed against the widow of the deceased.

Where on the death of a testator, leaving him surviving a childless minor widow entitled to maintenance and residence under his will, an application was made for probate of the will of the deceased, by two of his brothers appointed executors, the Court ordered that a special citation should issue to the widow, and directed that it should be served personally on her and also on her father with whom she occasionally resided. 27 C. 350. **B**

(10) Special citation necessary in the case of minors.

Although it is quite true that S. 69 which provides for the issue of citation, does not render it *obligatory* on the Court to issue any special citation, but merely declares that it shall be lawful for the Court to do so, yet, it is not only desirable, but necessary in the ends of justice that this power should be exercised when it appears that some of the heirs whose interests are affected by the will are minors. 2 C.W.N. 100 (104-105). **C**

(11) Infant not cited, is entitled, on attaining age to require proof in his presence.

If a will which disinherits an infant, be admitted to probate, without the infant being cited, he is entitled, when he attains his majority, to require the executor to prove the will in his presence. 2 C.W.N. 100 (108-104). **D**

3.—“To come and see the proceedings”—(Concluded).

(12) Procedure when person to be cited is an infant.

- (a) In applying for the probate of a will which affects the interests of a minor, the proper course is to serve the minor with a notice and have a proper guardian *ad litem* appointed for him. 2 C.W.N. 100 (105). E
- (b) An infant ought to be represented by a guardian *ad litem* other than his mother who joins in the application for probate, and citation ought to be issued upon such guardian; and when no such citation is issued in the probate proceedings, the infant is, on attaining majority, entitled to ask for revocation of the probate. 10 C.L.J. 263 (274) = 3 Ind. Cas. 178. F

(13) When citations may be dispensed with.

- (a) In England, in the case of a small estate, the Court has dispensed with the citation of the next-of-kin on proof that they had notice of the application. *In the goods of Teece*, 1896, p. 6, cited in 1 Will. Exors., 10th Ed., 351 (e). G
- (b) Citation and advertisement have also been dispensed with where the estate was small, and the next-of-kin had not been heard of for many years. *In the goods of Reed*, 29 L.T.N.S. 932: *In the goods of John Callicott*, 1899, p. 189 cited in *Ibid*. H
- (c) Where a person executed a will and married a second time and then died, and his daughter by the first marriage applied for letters of administration, *held* that the will being inoperative by the subsequent marriage, letters of administration could be issued without issuing any citation on the executor named in the will. 5 C.W.N. cxlvii. I

(14) Citation or knowledge of prior proceedings is a bar to subsequent application for proof in solemn form or for revocation.

As to this, see notes under S. 50, *supra*. J

(15) Absence of citation when a just cause for revocation and when not.

As to this, see notes under S. 50, *supra*. K

4.—“Publication of citation.”

Manner of service of citation under the English rules.

Citation must be served personally if possible; if that is not possible, by advertisement in newspapers. See 1 Will Exors., 10th Ed., 352; Trist and Cote, 18th Ed., 235, 236. L

(2) Case where citation was issued by registered letter.

In the case of an application made by the attorney of the executors, who had taken out probate of the will in Canada, for letters of administration with a copy of the will annexed in respect of certain property left by the testator in India, it was *held*, under the special circumstances of the case, that citation might issue by registered letter from the Court with acknowledgment due. 23 A.W.N. 31. M

(3) When citations may be dispensed with

As to this, see note No. 13, *supra*. N

(4) Cost of citations may be required to be deposited before issue.

Where the Court directed citations to be issued by means of advertisement in a newspaper, it was ordered that the cost of such citations should be deposited before they could issue. 23 A.W.N. 30. O

Caveats against grant of probate or administration ¹.

70. Caveats against the grant of probate or letters of administration may be lodged with the District Judge or a District Delegate ;

[S. 251.]

and, immediately on any caveat being lodged with any District Delegate, he shall send a copy thereof to the District Judge ;

and, immediately on a caveat being entered with the District Judge, a copy thereof shall be given to the District Delegate, if any, within whose jurisdiction it is alleged the deceased had his fixed place of abode at the time of his death, and to any other Judge or District Delegate to whom it may appear to the District Judge expedient to transmit the same.

(Notes).

General.

(1) Corresponding Indian Law.

This section corresponds to S. 251 of the Indian Succession Act, X of 1865, but with the words "had his fixed place of abode" used in place of the word "resided" of the latter section. P

(2) Corresponding English Law.

S. 70 corresponds to S. 53 of the English St. 20 & 21, Vict. C. 77. Q

I.—"*Caveats against grant of probate or administration.*"

(1) Caveat, meaning.

- (a) Caveat is a caution entered in the Court of Probate to stop probates, administrations, faculties and such like from being granted without the knowledge of the party that enters. I Will. Exors. 10th Ed., 456. R
- (b) A caveat is merely a request that nothing be done in the matter of the estate of A.B. deceased, without notice to the caveator. *Per Strachey, J.*, in 22 B. 261 (265). R-1

(2) Duration of a caveat.

- (a) Under the English rules, a caveat remains in force for six months, and may be renewed. See I Will. Exors., 10th Ed., 456. S
- (b) There is nothing in the Probate and Administration Act providing any such period. T

(3) Purposes for which a caveat may be entered.

- (i) To give time to the caveator to make inquiries and to obtain such information as may enable him to determine whether or not there are grounds for his opposing the grant. Trist & Coote, 18th Ed., 331. U
- (ii) To give him an opportunity of raising any question arising in respect to the grant before the Judge. (*Ibid.*) Y
- (iii) To enable the caveator to apply for an order that the sureties for an administrator shall justify, or that they shall be resident within the jurisdiction of the Court, or that the administrator shall exhibit an inventory or give a bond to pay creditors *pro rata*. (*Ibid.*) W

1.—“Caveats against grant of probate or administration”—(Concluded).

- (iv) As a step preliminary to the commencement of an action between the caveator and the party warning the caveat. (*Ibid.*) **X**

(4) Entry of a caveat does not necessarily make the proceeding contentious.

The entry of a caveat is not necessarily a contentious proceeding, and does not necessarily imply an intention to oppose the grant. For, the caveator may only want time to make inquiries and obtain information. See *Moran v. Place*, 1896, p. 214; *Salter v. Salter*, 1896, p. 291 cited in 22 B. 261 (265). **Y**

(5) When a testamentary proceeding becomes contentious.

A petition for probate or letters of administration becomes contentious, not upon the entry of a caveat, but upon the filing of the affidavit in support of the caveat. 22 B. 261. **Z**

(6) Whether a proceeding once contentious can become non-contentious.

- (a) In England there is a machinery by which, even after a writ of summons has issued making the proceeding a contentious one, an order may be obtained for discontinuance of contentious proceedings, and for the issue of probate in common form. *Per Strachey, J.*, in 22 B. 261 (266). **A**

- (b) In India there being no such machinery, a probate matter which has once become a suit, can only be disposed of like other suits. (*Ibid.*) **B**

(7) A person can oppose the application for a grant without first lodging a caveat.

A person can oppose the application for granting probate or letters of administration without first lodging the caveat as required by Ss. 70 and 72, 6 Ind. Cas. 650. **C**

(8) District Judge, definition.

As to this, see S. 3, *supra*. **D**

[S. 252.]

Form of caveat 1. **71.** The caveat shall be to the following effect :—“ Let nothing be done in the matter of the estate of *A. B.*, late of _____, deceased, who died on the day of _____ at _____, without notice to *C. D.* of _____.”

(Notes).**General.****Corresponding Indian Law.**

This section corresponds to S. 252 of the Indian Succession Act, X of 1865. **E**

1.—“Form of caveat.”**Form of caveat, significance.**

The form of the caveat shows that the person who enters a caveat admits that the particular property forms a portion of the estate of the testator, but objects either to the execution of the will, or to the proposed manner of dealing with any portion of the estate, 17 C. 48 (52).

72. No proceeding shall be taken on a petition for probate or letters of administration after a caveat against the [S. 253.]

After entry of caveat, no proceeding taken on petition until after notice to caveator 1.

grant thereof has been entered with the Judge or District Delegate to whom the application has been made, or notice thereof has been given of its entry with some other Delegate, until after such notice to the person by whom the same has been entered as the Court shall think reasonable.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 253 of the Indian Succession Act, X of 1865. **G**

1.—“*After entry of caveat, no proceeding taken on petition until after notice to caveator.*”

(1) In Calcutta caveator must file affidavit showing his interest and grounds of objection.

In Calcutta, an affidavit must be filed within eight days from the entry of the caveat or thereafter with the special leave of the Court, stating the right and interest of the caveator, and the ground of objection to the application. Belchamber, 750. **H**

(2) Similar practice in Bombay.

A similar practice prevails in the Bombay High Court. See 22 B. 261. **I**

(3) In Calcutta, a caveat may be set down for argument to determine right of caveator.

In the original side of the Calcutta High Court, a caveat may be set down for argument in order to determine the right of the caveator. Belchamber Rule 751. **J**

(4) Procedure, where caveator found to have no interest.

The Act does not contemplate any proceeding for taking the caveat of the file where the caveator has no interest, but where the interest is in issue, the Judge, may, if he thinks delay, trouble, or expense may be saved thereby, try and determine the question of interest first before proceeding to try the issues as to the *factum* of the will. Ph. and Trev. 388. **K**

(5) District Judge, definition.

As to this, see S. 3, *supra*. **L**

73. A District Delegate shall not grant probate or letters of [S. 253-A.]

District Delegate when not to grant probate or administration .

administration in any case in which there is contention as to the grant, or in which it otherwise appears to him that probate or letters of administration ought not to be granted in his Court.

Explanation.—By “contention” is understood the appearance of any one in person, or by his recognized agent, or by a pleader duly appointed to act on his behalf, to oppose the proceeding.

(Notes).

General.

(1) Corresponding Indian Law.

This section corresponds to S. 253-A of the Indian Succession Act, X of 1865. **M**

(2) Corresponding English Law.

S. 73 is based on S. 48 of the English St. 20 & 21 Vict. C. 77. **N**

I.—“*District Delegate when not to grant probate or administration.*”

(1) Restricted powers of District Delegates.

As to this, see notes under S. 58, *supra*. **O**

(2) No provision where there is contention in cases before the District Delegate.

The section is silent as to what is to be done in case where there is contention in cases before the District Delegate. Hend., 3rd. Ed., 317. **P**

[S. 253-B.]

74. In every case in which there is no contention, but it appears to the District Delegate doubtful whether the probate or letters of administration should or should not be granted, or when any question arises in relation to the grant, or application for the grant, of any probate or letters of administration, the District Delegation may, if he thinks proper, transmit a statement of the matter in question to the District Judge, who may direct the District Delegate to proceed in the matter of the application, according to such instructions as to the Judge may seem necessary, or may forbid any further proceeding by the District Delegate in relation to the matter of such application, leaving the party applying for the grant in question to make application to the Judge.

Power to transmit statement to District Judge in doubtful cases where no contention 1.

(Notes).

General.

(1) Corresponding Indian Law.

This section corresponds to S. 253-B. of the Indian Succession Act, X of 1865. **Q**

(2) Corresponding English Law.

S. 74, corresponds to S. 50 of the English St. 20 & 21 Vict. C. 77. **R**

I.—“*Power to transmit statement to District Judge in doubtful cases where no contention.*”

(1) District Judge, definition.

As to this, see S. 3, *supra*. **S**

Contention, meaning.

As to this, see S. 73, Explanation, *supra*. **T**

75. In every case in which there is contention, or the District Delegate is of opinion that the probate or letters of administration should be refused in his Court, the petition, with any documents that may have been filed therewith, shall be returned to the person by whom the application was made, in order that the same may be presented to the District Judge; [S. 253-C.]

Procedure where there is contention
1 or District Delegate thinks probate or letters of administration should be refused in his Court.

Delegate is of opinion that the probate or letters of administration should be refused in his Court, the petition, with any documents that may have been filed therewith, shall be returned to the person by whom the application was made, in order that the same may be presented to the District Judge;

unless the District Delegate thinks it necessary, for the purposes of justice, to impound the same, which he is hereby authorized to do; and in that case the same shall be sent by him to the District Judge.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 253-C of the Indian Succession Act, X of 1865. **U**

1.—“Procedure where there is contention.”

(1) District Judge, definition.

As to this, see S. 3, *supra*.

V

(2) Contention, meaning.

As to this, see S. 73, Explanation, *supra*.

W

Grant of probate to be under seal of Court.

76. Whenever it appears to the Judge or District Delegate that probate of a will should be granted ¹, he shall grant the same under the seal of his Court in manner following:—

[S. 254.]

“I, _____, Judge of District of _____, [or Delegate appointed for granting probate or letters of administration in (here insert the limits of the Delegate’s jurisdiction)] hereby make known that on the _____ day of _____ in the year _____ the last will of _____, late of _____, a copy whereof is hereunto annexed, was proved and registered before me, and that administration of the property and credits of the said deceased, and in any way concerning his will was granted to _____, the executor in the said will named, he having undertaken to administer the same and to make a full and true inventory of the said property and credits and exhibit the same in this Court within six months from the date of this grant or within such further time as the Court may from time to time appoint, and also to render to this Court a

Form of such grant.

true account of the said property and credits within one year from the same date or within such further time as the Court may from time to time appoint.

The day of , 18 ."

(Old Acts.)

Act VI of 1889.—S. 12 of this Act substituted the words in S. 76 beginning from "he having undertaken to administer" and ending with "from time to time appoint" in place of the original words which ran as follows :—

"he having undertaken to administer the same, and to make a true inventory of the said property and credits, and to exhibit the same at or before the expiration of six months from the date of this grant, and also to render a true account of the said property and credits within one year from the same date."

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 254 of the Indian Succession Act, X of 1865. X

1.—"When it shall appear to the Judge or District Delegate that probate of a will should be granted."

- (1) Court has no discretion but to grant probate to executor named in will, if he is not legally incapable.

As to this, see notes under S. 6, *supra*.

Y

Payment of Court-fees on application for probate and letters of administration.

- (1) Court fee payable before grant of probate or letters of administration.

An order for probate or letters of administration, cannot be made, until the petitioner has filed in Court a valuation of the property in the form provided by Sch. III of the Court Fees Act and the Court is satisfied that the fee mentioned in Art. 11 of Sch. I, has been paid. See the Court Fees Act, VII of 1870, as amended by Acts VII of 1889 and XI of 1899.

Z

- (2) Probate duty in respect of annuity.

For the purpose of determining the probate fee to be paid in respect of an annuity, the word "value" in the Court Fees Act, Sch. I, cl. 11, must be taken to mean the market value of the annuity and not ten times the amount of a yearly payment. 1 B. 118.

A

- (3) Probate duty in respect of estate charged with annuity.

Where an annuity is charged on the estate, the Court fee should be levied on the value of the property less the capitalised value of the annuity. 3 C. 736.

B

- (4) Probate duty in respect of rent of a house.

Where letters are granted limited for the purpose of collecting the rent of a house, the duty is to be assessed on the value of the house and not on the rent. 1 B.L.R. 30=18 W.R. 153.

C

1.—“When it shall appear to the Judge or District Delegate that probate of a will should be granted”—(Continued).

(5) Probate duty in respect of mortgaged property.

Where the property in respect of which probate is sought is mortgaged, the amount of the mortgage incumbrance must be deducted from the market value of the property, and the probate fee charged on the balance only. 1 B. 118; see, also, 8 B.L.R. Ap. 43=16 W.R. 252. D

(6) Probate duty when payable in respect of foreign assets.

(i) The Administrator-General is bound to pay the *ad valorem* Court fee, upon property in India at the time of the grant of administration, though duty in respect of it had already been paid by the deceased's executrix in England. 4 C. 725 (doubted in 21 B. 139). E

(ii) Where the estate of the deceased comprised of a share of partnership property situate partly in England and partly in India, and the probate duty on the value of the whole estate was paid in England, nevertheless, on an application for probate of the will in India it was held that probate duty was payable. 1 C. 168. F

(iii) Probate duty under the Court Fees Act VII of 1870, Sch. I, No. 11, is payable only on assets which at the testator's death are in British India. 21 B. 139. G

(iv) On an application to the High Court of Bombay for probate of the will of a person who died in England as a partner of a firm which had its head office in London and branches at Bombay and Calcutta, held that no probate duty was payable on the value of the share of the deceased as a partner in the firm or the properties of the firm situated in British India at his death. 21 B. 673. H

(v) The test of liability to probate duty is, therefore, the locality of the assets not at the time of the grant, but at the time of the testator's death; and no change of locality subsequent can affect their liability. 21 B. 139 (150). I

(vi) It is not every asset of the estate that is to be valued for duty, but only such of the assets of the estate as were at the date of the death of the testator locally within the jurisdiction of the authority which grants the probate. *Suddely v. Attorney-General*, 1897 Ap. Cas. 11. J

(7) Probate duty in respect of chose-in-action.

(a) Where the estate of the deceased consisted mainly of a chose-in-action and there was nothing to enable the Court to determine the amount or value of the right which the deceased was seeking to enforce in her suit, probate was directed to issue without payment of stamp duty, petitioner being directed, on the termination of the suit in question, to file in Court a statement showing the result of the suit. 24 M. 241. K

(b) Where property is not reduced into possession when probate is taken out, but the right to recover it is the subject of suit, the valuation of such property by the applicant, at less than Rs. 1,000, may be accepted by the Court. 23 C. 577. L

1.—“When it shall appear to the Judge or District Delegate that probate of a will should be granted” —(Continued).

(8) Probate duty in respect of property decreed by Court.

When a person whose right to certain property has been declared by a decree of Court, applies for letters of administration in respect of it, he must pay duty for the grant, there being no ground of exemption. See 20 W. R. 440. **M**

(9) Joint family property passing by survivorship, whether liable to probate duty.

(a) Joint family property devolving by survivorship is not liable to probate duty. 23 C. 980=1 C.W.N. 31. **But** see *contra* 11 B.L.R. App. 39 =19 W.R. 230. **N**

(b) The estate of a Hindu in the hands of his deceased daughter's representatives was held to be trust property, for purpose of letters of administration of which no duty was payable under the Court Fees Act. 14 B.L.R. 184. **O**

(c) Although on death of a Hindu co-parcener, his estate vests by survivorship in the survivors, who are not bound to take letters of administration, where the latter invoke the jurisdiction of the Court by applying for letters of administration on the footing that the property belonged to the deceased, it was *held* that they could not claim a refund of the Court-fee paid on the ground that no letters of administration were necessary. 27 B. 140. **P**

(10) Property subject to a power whether liable to probate duty.

(a) Where a person having a life-interest in a fund with a general power of appointment over it exercised such power by will, it was *held* that such fund was exempt from probate duty. 12 B.L.R. Ap. 21=21 W.R. 245. See, also, 6 B.L.R. 138=15 W.R. 457 (f). **Q**

(b) A power of appointment given to a testatrix by her husband is “property” for the purpose of probate duty, within the meaning of Sch. I, Item II of the Court Fees Act, VII of 1870. 25 M. 515. **R**

(11) Property subject to a power whether liable to probate duty—English Law.

In England by St. 23 & 24, Vict. c. 15, S. 4, it is provided that probate duty shall be levied and paid upon all personal property appointed by will under a general power. **S**

(12) Trust property whether liable to probate duty.

(a) Trust property is not liable to probate duty. 6 B.L.R. 138=15 W.R. 457 (f). **But** see *contra*, 7 B.L.R. 57=15 W.R. 456 (Both decided before the amendment of the Court Fees Act). **T**

(b) The exemption of trust estates from the payment of *ad valorem* Court-fee is not conditional on the circumstance that there has been a previous grant of probate or letters of administration on which a Court fee had been paid. The exemption has reference to the character of the property and not to the procedure adopted. 29 B. 161=6 Bom. L.R. 152, *disapproving* 27 B. 140, and *following* 23 C. 930. **U**

1.—“When it shall appear to the Judge or District Delegate that probate of a will should be granted”—(Continued).

(13) Trust property whether liable to probate duty—English Law.

In England, by St. 48, Geo. III, C. 149, S. 85, a grant of probate or letters of administration is valid and available by the executor or administrator for recovering property left by the deceased as trustee, although the value of such property was not included in the value of the estate in respect of which probate duty was paid. See II Will. Exors., 10th Ed., 1727 (n). Y

(14) Uncertainty of recovering a debt, no ground of exemption from duty.

The uncertainty of recovering a debt due to the estate of a deceased person is not a sufficient ground for a proportionate reduction of the fee payable in respect of letters of administration to such estate. 18 B.L.R. Ap. 24=21 W.R. 397. See, also, 24 C. 567. W

(15) Debts whether liable to probate duty.

The Court fee payable for letters of administration is to be calculated on the amount or value of the property in respect of which the letters are sought, without deducting therefrom the debts due by the deceased. 9 B.L.R. 30. X

(16) Debts whether liable to probate duty—English Law.

Under the English Law, doubtful and desparate debts need not be included in the amount on which duty is payable. *Moses v. Crafter*, 4 C. & P. 524. Y

(17) Present law under the Court Fees Act as amended.

Now, by Sch. III to the Court Fees Act, added by the Amendment Act, XI of 1899, the amount of debts payable out of the estate as well as the property held in trust not beneficially or with general power to confer beneficial interest, is allowed to be deducted in the statement of valuation and only the Court fee on the balance has to be paid. Z

(18) Practice as to payment of Court-fees in respect of probates and letters of administration.

Under S. 19 (k) Court-Fees Act, Court fee stamps are not now affixed either to the application for probate or letters of administration, or to the certificates, but are prepaid into Court under S. 19 (i). L.B.R. (1900), 623 (625). A

(19) Practice of Calcutta High Court as to payments of Court-fee.

(a) The *ad valorem* Court fee in an application for letters of administration should be prepaid to the satisfaction of the Court to the Registrar and certified by him to the Court where an exemption is claimed and allowed. This certificate should be produced to the Court with the application and affidavit of valuation. 26 C. 407=3 C.W.N. 392. *But see infra*. B

(b) Succession duty is payable before the order for grant of probate or letters of administration can be made, but not necessarily payable at the time of the application for such grant. 5 C.W.N. coliv. C

1.—“When it shall appear to the Judge or District Delegate that probate of a will should be granted”—(Concluded).

- (20) *Ad valorem* fee payable on second grant payable where not paid on first grant.

Where a grant of probate was made in 1862 to one of several executors without payment of an *ad valorem* Court-fee and on the death of that executor, his co-executors applied for a second grant after the Court-Fees Act was passed, *held*, they were liable to pay the *ad valorem* fee. 2 C.L.R. 436. D

- (21) Court-fee deducted on second grant when paid on first grant.

In case of a second grant, the fees payable under the first grant are to be deducted. See S. 19-C of the Court Fees Act, VII of 1870. E

- (22) Court-fee payable on appeal to High Court from order granting letters of administration.

The Court-fee payable on a memorandum of appeal presented to the High Court under S. 86 from an order of the District Judge granting letters of administration is Rs. 2 under Act VII of 1870, Sch. II, Art. 1 (d); Sch. II, Art. 117, is not applicable to such a memorandum of appeal. 9 A.W.N. 27. F

[S. 255.]

77. Whenever it appears to the District Judge or District Delegate that letters of administration to the estate of a person deceased, with or without a copy of the will annexed, should be granted, he shall grant the same under the seal of his Court in manner following :—

Grant of letters of administration to be under seal of Court.

“ I, _____, Judge of the District of _____, [or Delegate appointed for granting probate or letters of administration in (here insert the limits of the Delegate’s jurisdiction)] hereby make known that on the _____ day of _____ letters of administration (with or without the will annexed, *as the case may be*) of the property and credits of _____, late of _____, deceased, were granted to _____, the father (*or as the case may be*) of the deceased, he having undertaken to administer the same, and to make a full and true inventory of the said property and credits, and exhibit the same in this Court within six months from the date of this grant or within such further time as the Court may from time to time appoint, and also to render to this Court a true account of the said property and credits within one year from the same date or within such further time as the Court may from time to time appoint.

The _____ day of _____ 18 ____.”

(Old Acts).

Act VI of 1889 :—S. 13 of this Act substituted the words in S. 77 beginning from “he having undertaken to administer” and ending with “from time to time appoint” in place of the original words which ran as follows :—

“He having undertaken to administer the same and to make a true inventory of the said property and credits, and to exhibit the same in this Court at or before the expiration of six months from the date of this grant, and also to render a true account of the said property and credits within one year from the same date.”

(Note).

General.

Corresponding Indian Law.

This section corresponds to S. 255 of the Indian Succession Act, X of 1865. **F-1**

78. Every person to whom any grant of letters of administration is committed, and, if the Judge so direct, any person to whom probate is granted, shall give a bond to the Judge of the District Court, to enure for the benefit of the Judge for the time being, with one or more surety or sureties, engaging for the due collection, getting in, and administering the estate of the deceased, which bond shall be in such form as the Judge from time to time by any general or special order directs.

[S. 256.]

Administration-bond¹.

(Notes).

General.

(1) Corresponding Indian Law.

(a) This section corresponds to S. 256 of the Indian Succession Act, X of 1865, but with the words “every person to whom any grant of letters of administration is committed, and if the Judge so direct, any person to whom probate is granted” used in place of the words “every person to whom any grant of letters of administration other than a grant under S. 212 is committed” of the latter section. **G**

(b) “The Indian Succession Act, following the English Law provides for the taking of security, for the due discharge of his office only from an administrator, it being considered that, in the case of an executor, who is selected by the testator himself, such security can safely be dispensed with. But amongst the classes to which the Probate and Administration Act applies cases will occasionally occur, in which it may be expedient to take security even from an executor.” Statement of Objects and Reasons for the Probate and Administration Act, para 8. **H**

(2) Under S. 256 of the Succession Act, no bond can be required from an executor.

(a) It having been the uniform practice of the Court to grant probate without taking a bond from executors named in the will, it was held that it was unnecessary to depart from the practice, notwithstanding the words of S. 3 and 256 of the Succession Act. 4 C.L.R. 498. **I**

(b) A bond is not to be taken from a person to whom a *probate* is granted under the Indian Succession Act. 3 M.H.C.R. App. X. **J**

General—(Concluded).

(3) Corresponding English Law.

- (a) By St. 20 and 21, Vict. C. 77, Ss. 81 and 82, persons to whom grants of administration are made are required to give a bond to the Judge with one or more securities in a penalty of *double* the amount under which the estate of the deceased is sworn. See I Will. Exors., 10th Ed., 421-422. K
- (b) In England, the penalty of the bond is double the gross value of the personalty and the gross annual value of the realty. Trust and Coote. 18th Ed., 91. L

(4) Scope of the section.

This section is not limited in its operation to the execution of a surety-bond when the grant is *first* made, but is also applicable if, during the continuance of the grant, the bond becomes inoperative by reason of the death of the surety or its cancellation from some other cause. 29 C. 68=6 C.W.N. 7. M

I.—“Administration-bond.”

(1) Origin of the practice of giving bond.

As to this, see 1 in Jur. N.S. 299. N

(2) Bond given in whose favour.

- (a) Under S. 78, an administration bond should be given to the “Judge of the District Court.” In the case of the High Court, the practice is to take administration bonds in the name of the Chief Justice, and the proper person to assign such a bond under S. 79 of the Act is one of the officers of the High Court, *e.g.*, the Registrar on the Original Side 33 C. 713=3 C.L.J. 422=10 C.W.N. 673. O
- (b) In Madras, the bond required by S. 78 is required to be in the name of the Registrar, to enure for the benefit of the Registrar of the High Court for the time being, with two or more sureties to be approved by him, and for an amount equal to the full value of the estate. Rule 464, Original Side Rules. P

(3) Minor taking out administration after attaining age must give same security.

Where there has been administration during minority, and the minor on coming of age takes out administration, he must give the same security. *Abbot v. Abbot*, 2 Phil. 578. Q

(4) Where estate partly administered, bond may be given for the unadministered portion.

Where an estate has been partly administered, the bond may be for the unadministered estate. *In re Halliwell*, 10 P.D. 198; *In re Oakey*, 1896, p. 7. R

(5) No bond is case of grant to the Administrator-General.

The Administrator-General never enters into any bond, having regard to the provisions of Act II of 1874. S

(6) In England, Court can dispense with sureties but not with bond.

Under the English Act, the Court has power to dispense with sureties altogether, but not to dispense with the bond. I Will. Exors., 10th Ed., 425-426. T

I.—“Administration-bond”—(Concluded).

- (7) Under S. 78, Court can make a special order as to form of bond, but cannot dispense with it.

S. 78 requires a bond to be given in every case, but in such form as the Judge shall from time to time by any general or special order direct. It is open to the Court only to make a special order as to the form of the bond, but not to dispense with a bond in any case. 26 C. 408=3 C.W. N. 364. U

- (8) When sureties may be dispensed with.

(a) Where the estate or property is in the custody of the Court, the sureties may be dispensed with. *Re Cope*, 15 P.D. 107; *Re Wilcocks*, 67 L. T. 528; *Re Leach*, 80 L.T. 170; *Re Cory*, 1903, p. 62. Y

(b) Where the sole executrix and universal legatee of the deceased testator died without obtaining pro bate, and no answer was received for the advertisements inserted for any creditors of the estate, the executors or the executrix on applying for a grant of administration with the will of the testator annexed, were excused from finding sureties, and their personal bond alone was accepted, on their undertaking to retain for one year assets of the testator equal to four times the value of his known debts to meet any possible claims. *In the estate of Harper*, 1909, p. 88. W

- (9) Guarantee Society may be a surety.

Guarantee Societies are now allowed as sureties. *Carpenter v. Queen's Proctor* 7 P.D. 235. X

- (10) Practising attorney cannot be a surety.

Practising attorneys are not accepted as sureties to an administration bond. *Hend*, 3rd Ed., 320. Y

- (11) Form of administration bond in case of a limited grant.

The administration bond may follow the English form, according to which, in the case of a limited or special administration, it provides that the administrator “will exhibit a true and perfect inventory of the said estate and effects *limited as aforesaid* and render a just and true account thereof whenever required by law so to do.” 26 C. 408=3 C. W.N. 364. Z

- (12) No appeal lies on the ground that the security accepted is insufficient.

The fact that the security accepted by the lower Court is insufficient, cannot give a right of appeal. 20 C. 245. A

- (13) Under S. 78 of the Probate Act, Court cannot require security from executor after the grant.

Although under S. 78 of the Probate Act, a District Judge is competent to require security from an executor, he has no authority to call upon the executor, after probate has been already granted, to furnish security at any time after the grant of probate. 31 C. 688=3 C.W. N. 668. B

- (14) But a second bond may be taken, when necessity arises.

A District Court, after once having taken a bond with sureties, has jurisdiction to take a second bond, with fresh sureties, if necessary. 29 C. 68=6 C.W.N. 7. C

[S. 257.]

Assignment of administration-bond.

79. The Court may, on application made by petition and on being satisfied that the engagement of any such bond has not been kept,

and upon such terms as to security, or providing that the money received be paid into Court, or otherwise as the Court may think fit,

assign the same to some proper person,

who shall thereupon be entitled to sue on the said bond in his own name as if the same had been originally given to him instead of to the Judge of the Court, and shall be entitled to recover thereon, as trustee for all persons interested, the full amount recoverable in respect of any breach thereof.

(Notes).

General.

(1) Corresponding Indian Law.

This section corresponds to S. 257 of the Indian Succession Act, X of 1865. D

(2) Corresponding English Law.

By St. 20 and 21, Vic. C. 77, S. 83, the Court may, on application, on being satisfied that the condition of the bond has been broken, assign the same to a person named who shall be entitled to sue thereon in his own name and recover, as trustee for all persons interested, the full amount recoverable in respect of any breach of the condition of the said bond. See *I Will, Exors.*, 10th Ed., 423. E

I.—“Assignment of administration-bond.”

(1) Of what the Court must be satisfied before assigning the bond.

(a) In England the Court will allow an administration-bond to be assigned only upon being satisfied (i) that the application for the order is made *bona fide*, (ii) that a *prima facie* case is made out, (iii) that the applicant is the proper person to whom the bond should be assigned. See in the *goods of Cartwright*, 1 P.D. 422, cited in *I Will. Exors.*, 10th Ed., 423; in the *goods of Young*, 1 P. and M. 180, cited in *Trist. and Coote*, 13th Ed., 94. F

(b) Upon a petition to the High Court for the transfer of an administration bond under S. 79 on the allegation that the administratrix had refused to pay certain monies due to the petitioners on a pro-note given to them by the deceased, and it was admitted that the estate of the deceased was capable of meeting the claim, held on a *prima facie* case having been made out, that, under the circumstances, it was competent for the High Court, on a petition being presented to it for the assignment of an administration-bond, to pass an order authorising the transfer of it, and empowering the assignee to sue as a trustee for the benefit of the creditors. 6 N.W.P.H.C.R. 62. G

(2) What amounts to a breach of the bond.

(i) Failure to exhibit inventory. 10 A. 29.

(ii) Failure to make a just and true account. *Archbishop of Canterbury v. Willis*, 1 Salk 172, 315.

I.—“Assignment of administration-bond”—(Continued).

(iii) Conversion of the goods of the deceased to the administrator's own use, to the loss of the estate. *Archbishop of Canterbury v. Robertson*, 1 Crompt & M. 690.

(iv) Payment of a legacy bequeathed to an infant, to a person who afterwards absconds. *Dobbs v. Brain*, 2 Q.B. 97. H

(3) Mere Delay in exhibiting inventory is not breach of the bond.

Mere delay in exhibiting inventory, would not, in the absence of any actual damage, entitle an assignee of the bond to recover the penalty. *Archbishop of Canterbury v. Willis*, 1 Salk 172. I

(4) A creditor can apply for assignment of the bond.

A creditor of the deceased is a proper person within the meaning of the section to apply for an assignment of the bond. 10 A. 29. J

(5) But not when he can otherwise recover his debt.

But the assignment will not be made at the instance of a creditor who can otherwise recover his debt. 6 N.W.P.H.C.R. 62. K

(6) Under S. 79 the bond may be assigned to the Administrator-General.

S. 79 is not confined to private individuals only; an administration-bond may be assigned to the Administrator-General. 33 C. 713 = 3 C.L.J. 422 = 10 C.W.N. 673. L

(7) Who can sue on the bond.

(a) No one except the Judge or the person to whom the bond is assigned can sue. See 5 A. 248. M

(b) Can a succeeding administrator sue the sureties of the first administrator on the security bond not assigned to him? No. See the analogous case of 5A. 248 = 3 A.W.N. 12. N

(8) For what the surety is liable.

An administration-bond does not become void when the letters of administration are cancelled, and while they remain unrevoked, the grantee is, to all intents and purposes, administrator of the estate, and for his acts and defaults as administrator, the sureties are and remain responsible. 35 C. 955 = 35 I.A. 109 = 12 C.W.N. 802 = 8 C.L.J. 94 = 10 Bom. L.R. 648 = 18 M.L.J. 367. O

(9) Invalidity of the grant does not make the bond void for purpose of surety's liability.

The invalidity of a grant of letters of administration, does not render the surety bond void and does not affect the liability of the sureties. 33 C. 713 = 3 C.L.J. 422 = 10 C.W.N. 673; affirmed on appeal to the P.C.; 35 C. 955 = 35 I.A. 109 = 12 C.W.N. 802 = 8 C.L.J. 94 = 10 Bom. L.R. 648 = 18 M.L.J. 367. P

(10) Bond induced by misrepresentation is not void for purpose of surety's liability.

Where a person made false representations to the Court and thereby obtained an order granting him letters of administration to the estate of a deceased person, and induced two other persons to stand surety for him by means of similar misrepresentations and showing them a copy of the said order, whereupon, they, in ignorance of the true state of

1.—“Assignment of administration-bond”—(Continued)

affairs, executed an administration-bond, and letters were issued in his favour, *held* (by 3 out of 5 Judges) that S. 20 of the Indian Contract Act did not apply to the case and that the sureties were liable. 33 C. 713=3 C.L.J. 422=10 C.W.N. 673; *affirmed* on appeal to the P.C.; 35 C. 955=35 I.A. 109=12 C.W.N. 802=8 C.L.J. 94=10 Bom. L.R. 648=18 M.L.J. 367. Q

(11) Nor bond induced by mistake.

An administration-bond is not invalidated by reason of mutual mistake on the part of the Court and the surety, or misrepresentation by Court. 12 C.W.N. 481 (486). R

(12) Measure of damages which can be recovered in a suit on the bond.

(a) In an action brought on the breach of a bond given under S. 78 and assigned over to the plaintiff, he cannot recover more damages than he could prove to have resulted to himself or those interested in the bond on which he relies. Such a bond cannot be regarded as an instrument covered by the Exception to S. 74 of the Indian Contract Act, so that the whole sum mentioned in the bond might become payable on the breach of a condition therein. 10 A. 29=7 A.W.N. 273. S

(b) But, according to Messrs. Philip and Trevelyan, the effect of the amendment of S. 74 of the Indian Contract Act, IX of 1872, by S. 4 of Act VI of 1899, is that even if actual damage or loss be not proved, reasonable compensation not exceeding the amount mentioned in the bond, can be given. Ph. & Trev. 398. T

(13) Can a surety to an administration-bond apply to be discharged.

(i) Under English Law, the Court will not discharge the original sureties to an administration-bond and allow other sureties to be substituted for them. *In the goods of Stark*, 1 P. & D. 76, cited in 1 Will. Exors., 10th Ed., 429; Trist. and Coote., 13th Ed., 93. U

(ii) In Calcutta, a surety under an administration-bond, who is not a legatee, and who is powerless to institute administration proceedings, can apply under S. 130, Indian Contract Act, for the revocation of the guarantee, on the ground of mal-administration by the executor. 29 C. 68=6 C.W.N. 7, *disapproved* in 28 M. 161. But see *contra, infra*. V

(iii) A surety of an executor is entitled to be discharged from his liability as regards the future transactions of the latter, when the executor, for whom he is surety, wastes the estate. As the fact of his discharge would be to revoke the probate, if fresh security is not furnished, an appeal lies against an order refusing to grant such discharge. 52 P.R. 1902=88 P.L.R. 1902. But see *contra, infra*. W

(iv) A surety to an administration-bond cannot of his own free-will withdraw from his suretyship. 31 A. 56 (57)=6 A.L.J. 19=(1908) A.W.N. 288=5 A.L.J. 349 (N). X

(v) Where one of the sureties under an administration-bond sued the administratrix and his other co-sureties for the discharge of his obligation of suretyship, as to future transactions of the administratrix, on the ground that she had mismanaged and wasted the properties, or in the alternative, that she might be ordered to discharge certain claims

I.—“Assignment of administration-bond”—(Concluded).

against the estate and complete the administration, held that the surety to an administration-bond is not entitled to the relief of discharge from his liability, either by way of an application in the probate proceedings, or by a separate suit, since the granting of such relief might defeat the object for which an administrator is required to find sureties to an administration-bond. 28 M. 161=14 M.L.J. 482 (following the principle of 19 B. 245, case of surety for the guardian of a minor's estate). Y

(vi) The special contract of suretyship entered into by a surety to an administration-bond is not governed by S. 130 of the Indian Contract Act, providing for revocation of continuing guarantee as to future transactions. 28 M. 161=14 M.L.J. 482. Z

(vii) But the Rules of the Madras High Court, Original Side, contain a provision that an application by an administrator or surety to vacate a bond or surety's recognisance may be made by summons in chambers. Rule 470; Original Side Rules. A

(viii) Rule 470 of the Madras High Court applies to an application to vacate a bond during the pendency of the administration with a view to having another surety appointed in the place of the surety whose bond is vacated. But there is no provision of law in India, as in England, which enables the Court to make an order to vacate an administration bond. *Per White, C.J.*, in 7 M.L.T. 160=5 Ind. Cas. 311. B

(ix) As the bond becomes void on the happening of a condition it is allowed to work itself out on the happening of that condition. So there is no need for the Court being invited to make a declaration on the subject, *Per Krishnaswami Iyer, J.*, in *Ibid.* C

(14) Notice necessary before assignment.

Before assignment is made, some form of notice should be given to the sureties and the administrator. *Baker v. Brooks*, 3 Sw. & Tr. 32. D

(15) What breaches can be alleged in the suit on the bond.

In suing on the bond, the plaintiff may prove breaches other than those, alleged by him when he obtained permission to sue. *Archbishop of Canterbury v. Robertson*, 1 Crompt & M. 690. E

(16) Practice in the Madras High Court as to application for assignment.

In the original side of the Madras High Court an application for the assignment of the bond may be made by summons in chambers. Rule 465; Original Side Rules. F

Time before which probate or administration shall not be granted 1.

80. No probate of a will shall be granted until after the expiration of seven clear days, and no letters of administration shall be granted until after the expiration of fourteen clear days, from the day of the testator or intestate's death.

[S. 258.]

(Notes).**General.****(1) Corresponding Indian Law.**

This section corresponds to S. 258 of the Indian Succession Act, X of 1865. **G**

(2) Corresponding rule in English Law.

Under the English Rules, no probate or letters of administration with the will annexed can be issued until after the lapse of seven days from the date of the deceased, unless under direction of the Judge. See I Will. Exors., 10th Ed., 234. **H**

1.—“Time before which probate or administration shall not be granted.”**(1) No Limitation for applications for probate or letters of administration.**

As to this, see notes under S. 55, *supra*. **I**

(2) Letters of administration with the will annexed may be granted after the expiration of seven days.

Letters of administration with the will annexed may be granted after expiration of seven clear days from testator's death. 1 C. 149. **J**

(3) Day of death to be excluded in computing period.

The period is to be computed excluding the day of the death of the deceased. Trist. and Coote., 13th Ed., 95. **K**

[S. 259.] **81.** Until a public registry for wills is established, every District Judge and District Delegate shall file and preserve among the records of his Court all original wills of which probate or letters of administration with the will annexed may be granted by him;

and the Local Government shall make regulations for the preservation and inspection of the wills so filed as aforesaid.

(Notes).**General.****(1) Corresponding Indian Law.**

This section corresponds to S. 259 of the Indian Succession Act, X of 1865. **L**

(2) Corresponding English Law.

S. 81 may be compared with Ss. 52, 66 and 91 of the English St. 20 & 21 Vict., C., 77. **M**

1.—“Filing of original wills of which probate or administration with will annexed granted.”**(1) District Judge, definition.**

As to this, see S. 3, *supra*. **N**

(2) Local Government, definition.

As to this, see notes under S. 52, *supra*. **O**

I.—“Filing of original wills of which probate or administration with will annexed granted”—(Concluded).

(3) Failure to file will is defective procedure under S. 50.

Where a will is not filed as required by S. 81, it is defective procedure so as to constitute good cause for revocation of the grant under S. 50. 37 P.L.R. 1902. P

(4) Provision for public registry of wills.

(a) In England St. 20 & 21 Vict., c. 77, S. 66, provides for a central place of deposit of original wills. Q

(b) In India, no special public registry for wills has been established as yet. Hend., 3rd Ed., 322. R

(5) Regulations for preservation and inspection of wills.

(a) For rules made by the Lieutenant-Governor of Burma, See Bur. R. M.

(b) For rules made by the Government of Madras, See Fort. St. George Gazette, 1905, Pt. I, p. 792 ; Madras Rules and Orders.

(c) For rules made by the Government of Bengal, see Bengal Rules and Orders.

(d) For rules made by the Government of United Provinces, see United Provinces, Rules and Orders. S

(6) Deposit of wills under the Indian Registration Act.

As to this, see Ss. 42 to 46 of the Registration Act, III of 1877. T

82. After any grant of probate or letters of administration, no [S. 260].

Grantee of probate or administration alone to sue, &c., until the same revoked 1. other than the person to whom the same shall have been granted shall have power to sue or prosecute any suit, or otherwise act as representative of the deceased, throughout the Province in which the same may have been granted, until such probate or letters of administration shall have been recalled or revoked.

(Notes).

General.

(1) Corresponding Indian Law.

This section corresponds to S. 260 of the Indian Succession Act, X of 1865. U

(2) Corresponding English Law.

S. 82 corresponds to S. 75 of the English St. 20 and 21 Vict. C. 77. Y

I.—“Grantee of probate or administration alone to sue &c., until the same revoked.”

(1) “Legal representative,” meaning.

The words “legal representative” in S. 234, C.P.C., 1882, do not include any person who does not in law represent the estate of the deceased. 17 M. 186=4 M.L.J. 59 ; see, also, 8 C.W.N. 842. W

(2) Where there is a will, heirs on intestacy are not legal representatives.

(a) Where a deceased person has left a will, his heirs on intestacy do not represent his estate. 22 C. 903. X

1.—“Grantee of probate or administration alone to sue, &c., until the same revoked” —(Continued).

- (b) Where, on death of an executrix who has proved the will, before fully administering the estate, the testator's heir brought a suit neither as representing the executrix, nor as the administrator *de bonis non* of the testator, his suit was held to fail on the ground that the estate of the testator was absolutely unrepresented. 16 M. 71. Y
- (c) See also notes under S. 12, *supra*.
- (3) Administrator under S. 10, Reg. VIII of 1827, is not legal representative.**
- (a) An administrator appointed under S. 10 of Reg. VIII of 1827 does not by such appointment become the legal representative of the deceased, or entitled to continue an appeal filed by him. 21 B. 102. Z
- (b) A certificate of heirship granted under Reg. VIII of 1827 is not *prima facie* evidence that the holder of it is the rightful heir of the deceased, the effect of such certificate is merely to give security to persons in possession of or indebted to the estate of the deceased in dealing with such holder as the legal representative of the deceased. 4 B.H.C. A.C. J. 178. A
- (c) But so long as an appointment of a person as administrator under S. 9 of Reg. VIII of 1827 lasts, no one else can represent the estate. 12 B. 150. B
- (4) Decree or execution against person in possession of estate of testator before grant of probate, how far binding.**
- As to this, see notes under S. 12, *supra*. C
- (5) In cases governed by the Succession Act, a decree obtained against a heir in possession, before the grant of administration, is not valid and binding on the estate.**
- As to this, see notes under S. 14, *supra*. D
- (6) Executor bringing a suit as such must produce the complete probate.**
- When probate of a will has been granted, and an executor appointed, the executor, in order to bring a suit as such, is under Ss. 179, 187 and 260 of the Succession Act, bound to prove his title, to prove which, he must produce the complete probate. 32 C. 710. E
- (7) Renouncing or incapable executors are not representatives under the section.**
- Under this section, it is only the executors who have obtained probate, that can act as representatives of the testator; those who renounce or refuse or are unable to act, should be regarded as if they had never been appointed. 27 C. 683 (688). F
- (8) Defences to an action by an executor or administrator.**
- (i) In an action by an executor or administrator, the defendant may plead that the supposed testator or intestate is alive, in which case the Probate Court will have no jurisdiction. II Will. Exors., 10th Ed., 1592; see *Allen v. Dundas*, 3 T.R. 129. G
- (ii) A defendant may plead that the seal attached to the probate produced by the plaintiff has been forged, or that the letters have been revoked. II Will. Exors., 10th Ed., 1592. H
- (iii) A defendant may plead that he has paid the debt, which is the subject of the action, to an executor who had obtained probate of a forged will, unrepealed at the time of the payment. II Will. Exors., 10th Ed., 1592. I

1.—“*Grantee of probate or administration alone to sue, &c., until the same revoked*”—(Concluded).

(9) Grounds on which probate could be impeached in a Civil Court—Effect of S. 44 of the Evidence Act.

As to this, see notes under S. 12, *supra*.

J

(10) No Court other than a Court of Probate can go behind the grant.

As to this, see notes under S. 12, *supra*.

K

(11) Effect of S. 41 of the Evidence Act on questions of probate.

As to this, see notes under S. 12, *supra*.

L

(12) Province, definition.

As to this, see S. 3, *supra*.

M

83. In any case before the District Judge in which there is contention, the proceeding shall take, as nearly as may be, the form of a suit, according to the provisions of the Code of Civil Procedure, in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who may have appeared as aforesaid to oppose the grant shall be the defendant. [S. 261.]

Procedure in contentious cases 1.

(Old Act).

Act XII of 1891 :—This Act substituted the word “proceedings” in S. 83 in place of the word “proceeding.”

(Notes).

General.

(1) Corresponding Indian Law.

This section corresponds to S. 261 of the Indian Succession Act, X of 1865. N

(2) S. 83 deals with procedure in contested testamentary proceedings.

For a case in which the procedure in contentious cases laid down in the Succession Act was drawn attention to. See 21 W.R. 84. O

(3) S. 83 does not apply to application for revocation.

S. 83 does not apply to an application for revocation of probate, which is governed by S. 55. 6 Ind. Cas. 912. P

1.—“*Procedure in contentious cases.*”

(1) Testamentary practice in India before the Probate and Administration Act.

The practice in India in testamentary matters previously to Act V of 1881 was the same as that of the Ecclesiastical Court in England, except so far as that practice might be inconsistent with the Civil Procedure Code, 5 B. 638. Q

(2) How far the English distinction between proof in *Common form* and that in *Solemn form* is recognised in the Succession Act.

(a) It is stated that according to the law in India, there is no distinction between proving a will in “*Common form*” and proving it in “*Solemn form*”. But the sections of the Indian Succession Act point

1.—“*Procedure in contentious cases*”—(Continued).

clearly to a difference between cases which are contested and cases which are not contested, and S. 261 corresponding to S. 83 of the Probate Act, lays down the procedure in contested cases. 2 C.W.N. 100 (102). R

(b) So long as a petition for probate or letters of administration is “non-contentious,” it is to be dealt with by the Registrar. As soon as it becomes “contentious,” it is to be treated as a plaint in a suit, and the suit is governed, so far as practicable, by the procedure prescribed by the C.P.C. 22 B. 261. S

(c) But, a grant of probate made in the *mofussil* is not quite the same as a grant in *Common form*, for, the grant is made after the execution of the will has been sworn to by the witnesses to the will, and the only circumstance that distinguishes it from the grant in *Solemn form* is that the grant is made *ex parte*. 33 C. 1001 (1008) = 10 C.W.N. 955. T

(d) Again, in England, in *Common form* grants neither citation upon the interested parties nor any hearing is necessary; while under this Act, no grant whatever (except by the High Court) can be made without citing all persons claiming to have interest in the estate of the deceased. Majumdar, Supplement 41. U

(3) **How far revocation proceedings are suits.**

(a) There is a distinction according to the grounds on which revocation cases are based. Where the ground on which revocation is sought is anything touching the validity of the will, such as fraud, forgery, undue influence or the like, the proceedings should be initiated by plaints, and such cases are necessarily “suits;” but where the grounds are mere irregularities in making the grant, the proceedings are to be initiated by motion, and should be treated as “miscellaneous proceedings.” See 5 C.W.N. 383. V

(b) A proceeding for revocation of probate is not a suit within the meaning of O. XXIII, R. 3, C.P.C., 6 Ind. Cas. 912. W

(4) **Procedure on application for revocation.**

As to this, see notes under S. 50, *supra*. X

(5) **What is the proper order in an application for revocation.**

As to this, see notes under S. 50, *supra*. Y

(6) **Until a case for revocation is made out, question of genuineness of will cannot be gone into.**

As to this, see notes under S. 50, *supra*. Z

(7) **Rules as to *onus* of proof in applications for revocation.**

As to this, see notes under S. 50, *supra*. A

(8) **“Plaintiff,” meaning.**

The word “plaintiff” means every person asking relief against another person. 10 Bom. L.R. 327. B

(9) **“Defendant,” meaning.**

“Defendant” includes every person served with any writ of summons or process, or served with notice of, or entitled to attend, any proceedings. S. 100, J.A. St. 36 & 37 Vict., C. 66. C

1.—“*Procedure in contentious cases*”—(Concluded).

(10) “Subject-matter of the suit” in testamentary proceedings.

In a testamentary proceeding, the “subject-matter of the suit” is the property of which the executor is the legal owner under the will of the testator, and of which the probate by declaring him to be executor recognises him before the Court as legal owner. 18 B. 237 (240) referring to 17 B. 388 (391). D

(11) Record of evidence, should be as in a regular suit.

Where a will is contested, the proceedings should take, as nearly as may be, the form of a regular suit, as if brought by the party propounding the will; and so where a Judge granted probate, it was held to be a serious defect that he took down only memoranda of the evidence and not the testimony of the witnesses in the language in ordinary use in proceedings before the Court. 24 W.R. 162. E

(12) Where caveator does not appear at the hearing—Procedure.

Where in consequence of the filing of an affidavit in support of a caveat, the probate proceeding becomes a suit, the whole suit must be disposed of by the decree of the Court. Where, therefore, at the hearing of the suit, the defendant does not appear in support of the caveat, the proper procedure is, not to dismiss the caveat leaving it to the Registrar to dispose of the petition as a non-contentious matter, but to dismiss the caveat and order the issue of probate, if the Court is satisfied that the papers are in order. 22 B. 261. F

(13) A receiver may be appointed in testamentary proceedings.

As to this, see notes S. 55, *supra*. F-1

(14) S. 177, C.P.C., though applicable to probate proceedings, should not be applied so as to dispense with proof of will.

Although by virtue of this section, the provisions of the C.P.C., are applicable to probate proceedings, S. 177 of the C.P.C., Act XIV of 1882 does not justify the Court, because the caveator refuses to answer a question in dispensing with the proof of the will set up, and granting probate to the petitioner. 9 B. 241. G

(15) Withdrawal of application—Effect.

(a) Though the provisions of the C.P.C., are made applicable to testamentary proceedings still, where an application for probate had been withdrawn before the proceedings became contentious, the provisions of S. 373, C.P.C., are not applicable, so that the petitioner is entitled as caveator to propound the same will in opposition to an application for grant of letters of administration to the estate of the deceased. 19 M. 458. G-1

(b) It is otherwise where the proceedings had become contentious by a caveat having been filed. Ph. & Trev. 400. G-2

(16) What the court should consider in contentious cases.

As to this, see notes under S. 69, *supra*. H

(17) Grant of probate or letters of administration—Its nature and the way in which it can be contested or set aside.

As to this, see notes under S. 50, *supra*. I

(18) District Judge definition.

As to this, see S. 3, *supra*. J

(19) Contention, meaning.

As to this, see S. 73, Explanation, *supra*. K

N.B.—See also notes under S. 55, *supra*.

[S. 262.]

84. Where any probate is, or letters of administration are, revoked, all payments *bona fide* made to any executor or administrator under such probate or administration before the revocation thereof shall, notwithstanding such revocation, be a legal discharge to the person making the same ;

Payment to executor or administrator before probate or administration revoked 1.

and the executor or administrator who shall have acted under any such revoked probate or administration may retain and reimburse himself out of the assets of the deceased in respect of any payments made by him which the person to whom probate or letters of administration shall be afterwards granted might have lawfully made.

Right of such executor or administrator to recoup himself 2.

(Notes).

General.

(1) Corresponding Indian Law.

This section corresponds to S. 262 of the Indian Succession Act, X of 1865. L

(2) Corresponding English Law.

The section corresponds to Ss. 77 and 78 of the English St. 20 & 21 Vict. C. 77 for the provisions of which, see I Will. Exors., 10th Ed., 460. L-1

(3) Principal of the section.

Every person is bound to pay deference to a judicial act of a Court having competent jurisdiction, and to give credit to a probate till it is vacated. *Allen v. Dundas*, 3 T.R. 129. M

(4) Scope of the section.

S. 84 affords protection to debtors making *bona fide* payments to an executor or administrator before revocation of the grant. But it does not protect purchasers. *Per Mitra, J.* in 33 C. 713 = 3 C.L.J. 422 = 10 C.W.N. 673. N

1.—“*Payment to executor or administrator before probate or administration revoked.*”

(1) Payment to executor or administrator under void grant is a discharge.

- (a) Payment to an executor who had obtained probate of a forged will is a discharge to the debtor, although the probate was afterwards revoked on citation. I Will. Exors., 10th Ed., 464. O
- (b) The grantee of letters of administration fully represents the estate of the deceased. Any payments made to him under any decree obtained by him affords the person so paying full indemnity against the claim of any other party. 10 C.W.N. 422 (425). P

(2) Where grant void—Effect on mesne acts of executor or administrator.

If a grant is void, *e.g.*, where administration is granted on the concealment of a will appointing executors, which will appear subsequently, the mesne acts of the executor or administrator done between the grant and its revocation, except in so far as they are protected by the Statute, are void and cannot be made good by relation. I Will Exors., 10th Ed., 461. Q

1.—“Payment to executor or administrator before probate or administration revoked”—(Continued).

(3) Where grant voidable—Effect on mesne acts of executor or administrator.

If a grant is voidable only, *e.g.*, where it has been granted to a party not next-of-kin or where the Court not knowing that an executor has acted, granted administration to another, or where a grant has been made without citing the necessary parties, all lawful acts done by the first administrator are valid. I Will. Exors., 10th Ed., 463. **R**

(4) Test whether grant void or voidable.

Where the grant is in derogation of the right of an executor, it is void; where it is in derogation of the right of the next-of-kin, or residuary legatee only, but by the proper jurisdiction, it is merely voidable. I Will. Exors., 10 Ed., 462. **S**

(5) Remedy of rightful representative against purchaser from wrongful executor or administrator.

(a) Where the grant is void, if the wrongful executor or administrator has sold the property of the deceased, the rightful representative may either maintain *trover* against the former, or claim the proceeds from him. *Lamine v. Dorrell*, 2 Lord. Raym. 1216 cited in I Will. Exors., 10th Ed., 462. **T**

(b) But, as between the rightful representative and the purchaser, the alienation, if done in the due course of administration, *e.g.*, for paying funeral expenses or debts, is not void. *Graysbrook v. Fox*, Plowd. 276 cited in I Will. Exors., 10th Ed., 462. **U**

(6) Presumption in favour of such purchaser.

Where a person who fills the position of an executor is found selling or mortgaging part of his testator's estate, he is to be presumed to be acting in the discharge of the duties imposed on him as executor, unless there is something in the transaction which shows the contrary; and the contrary is not made out merely from the circumstance that the alienation does not purport to be executed by him in that capacity. *Per Stirling, J.* in *Re Fenn and Furze's Contract*, 1894, 2 Ch. 101 (114). **Y**

(7) Purchaser not bound to make inquiry or see to the application of the money.

In English Law where executors in whom the legal estate is vested under their testator's will are selling real estate charged with debts, a purchaser is not bound to see the consideration money properly applied, or to inquire whether debts remain unpaid (unless twenty years have elapsed from the testator's death). *Sabin v. Heape*, 27 Beav. 533; *Re Tanqueray*, 20 Ch. D. 465, cited in II Will. Exors., 10th Ed., 1656 (f). **W**

(8) Illustrative cases.

(i) In an action of *detinue* brought by an executor against the defendant who had purchased goods belonging to the testator, from one to whom administration had been granted before the executor had proved the will, held that the executor who sued after probate, was entitled to recover. *Graysbrook v. Fox*, Plowd. 276, cited in I Will. Exors., 10th Ed., 461; see, also, *Ellis v. Ellis*, 1905, 1 Ch. 613. **X**

1.—“Payment to executor or administrator before probate or administration revoked”—(Concluded).

- (ii) If administration is granted before the refusal of the executor, a sale by the administrator of the testator's effects is void, although the executor afterwards appear and renounce. *Abraham v. Cunningham*, 2 Lev. 182, cited in *Ibid*. Y
- (iii) But, a grant of administration obtained by suppressing a will which contained no appointment of executor is not void *ab initio*, and a sale by such an administrator to an innocent purchaser is valid. *Boxall v. Boxall*, 27 Ch. D. 220. Z
- (iv) A grant of letters of administration obtained by suppressing a will which contained no appointment of executors is not void *ab initio*, and a sale of a property of the deceased, by the administrator who has obtained a grant of administration under such circumstances to a purchaser who was ignorant of the suppression of the will, is valid even where the grant is revoked after the sale. 33 C. 657=10 C.W.N. 662; referring to *Boxall v. Boxall*, 27 Ch. D. 220; *Ellis v. Ellis*, 1 Ch. 618. A
- (v) Where an auctioneer employed by a supposed executrix sold goods of the testator, but before payment, the real executrix claimed the money from the buyer, it was held that the auctioneer could not maintain an action against the buyer, though the latter expressly promised to pay on being allowed to take away the goods. *Lamine v. Dorrell*, 2 Lord Raym, 1216, cited in 1 Will. Exors., 10th Ed., 462. B
- (vi) Where an Englishman died leaving English and Indian assets the latter of which comprised shares in an Indian Bank, and an agent of the testator in India fraudulently obtained from the Calcutta High Court letters of administration to the Indian assets as on an intestacy and sold the shares publicly to a *bona fide* purchaser for a value, and subsequently the letters were revoked and fresh letters annexed with a copy of the will were granted to the executors, held that under the Indian Succession Act, the grant of letters to the testator's agent was void not *ab initio*, but only from date of revocation, and that the purchaser of the shares had a valid title. *Craster v. Thomas*, (1909) 2 Ch. 348. C
- (vii) A mortgage executed by a person to whom probate was granted by mistake, is bad. 6 C.W.N. 787. D
- (9) Acts done under probate of forged will are void.**
- (a) Where a will was declared to be a forgery and therefore void *ab initio*, any acts done by a person under any title created by that will, e.g., a mortgage, is void in law. 6 C.W.N. 787. E
- (b) See, also, notes under S. 12, *supra*. F
- (10) Probate granted to universal legatee is invalid *ab initio*.**
- As to this, see notes under S. 6, *supra*. G
- (11) Execution of will obtained by fraud—Effect.**
- As to this, see notes under S. 50, *supra*. H
- (12) Administration obtained fraudulently—Effect.**
- As to this, see notes under S. 50, *supra*. I
- (13) Probate obtained of a forged will—Effect.**
- As to this, see notes under S. 50, *supra*. J
- (14) Probate obtained fraudulently—Effect.**
- As to this, see notes under S. 50, *supra*. K

2.—“Right of such executor or administrator to recoup himself.”

Lawful payments under revoked grant may be re-imbursed out of the estate.

- (a) Under this section, any lawful payments made by a person to whom probate of a forged will was granted but subsequently revoked, may be re-imbursed out of the estate of the deceased. 6 C.W.N. 787. **L**
- (b) Thus, a widow was held entitled to re-imburse herself out of the assets of her deceased husband's estate, in respect of payments made by her while acting under a probate which was subsequently revoked. 6 C.W. N. 787. **M**

85. Notwithstanding anything hereinbefore contained, it shall, [M.]

Power to refuse letters of administration 1.

except in cases to which the Hindu Wills Act 1870, applies, be in the discretion of the Court to make an order refusing, for reasons to be recorded by it in writing, to grant any application for

letters of administration made under this Act.

(Notes).

General.

No corresponding Section in the Succession Act.

S. 85 has no corresponding section in the Indian Succession Act, X of 1865. **M-1**

1.—“Power to refuse letters of administration.”

(1) Effect of S. 85.

The effect of S. 85 is that, in cases to which the Hindu Wills Act applies, the Court *must* grant letters of administration with the will annexed to the person who under this Act shows himself entitled thereto; but where the will is not governed by the Hindu Wills Act, the Court can refuse to grant letters, Ph. & Trev. 401. **M-2**

(2) Judge incompetent to refuse probate to executor named in will.

As to this, see notes under S. 6, *supra*. **N**

86. Every order made by a District Judge or District Delegate [S. 263.]

Appeals from orders of District Judge 1.

by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court under the rules contained in the Code of Civil Procedure applicable to appeals.

(Notes).

General.

(1) Corresponding Indian Law.

This section corresponds to S. 263 of the Indian Succession Act, X of 1865. **N-1**

(2) Scope of S. 86.

(a) The meaning of S. 86 is not, that every order made by a District Judge by virtue of powers conferred on him under the Succession Act is subject to appeal to the High Court, but the meaning is to be controlled by the concluding words, which make all appeals under the Section, “subject to the Rules contained in the Code of Civil Procedure applicable to appeals.” 2 C.L.R. 589 (591). **O**

General—(Concluded).

- (b) But the section does not mean only that those orders which are appealable under S. 588, C.P. C., 1882, can be appealed, 52 P.R. 1902=89 P.L. R. 1902. P

I.—“Appeals from orders of District Judge.”**(1) District Judge, definition.**

As to this, see S. 3, *supra*. Q

(2) “Hereby,” meaning.

The word “hereby” in the section means “by the whole Act” and not merely by the chapter in which the section appears. 28 C. 149=5 C.W.N. 443. R

(3) Where inconsistent, provisions of C.P.C. prevail.

If the provisions of C.P.C., are inconsistent with those of the Probate and Administration Act, those of the Code must prevail as it is the later enactment. 24 C. 80=1 C.W.N. 8. S

(4) As appeal from grant of letters of administration is a first appeal from an order.

An appeal from an order of a District Judge granting letters of administration under the the Succession Act was held properly brought as a first appeal from an order. 15 A.W.N. 127. T

(5) Order granting probate is appealable.

An appeal lies under S. 10 of the N.W.P. Letters Patent from the judgment of a single Judge in appeal from an order of a District Judge granting probate of a will under Chapter V of Act V of 1881. 17 A. 475=15 A. W.N. 104. U

(6) Order suspending grant of probate and directing re-opening of case, not appealable.

Where an application for probate has been granted, and on objection being made, a subsequent order was passed, directing, “that the case may be re-opened, that probate be suspended” for a time certain, “and that the executor bring in his evidence to prove his right to obtain probate,” *held* that no appeal lay from such order. 2 C L.R. 589. V

(7) Order refusing to stay issue of probate is a “Judgment” and is appealable.

An order made by a Judge of the High Court refusing to stay the issue of probate and the discharge of the Receiver appointed in a probate action is a “judgment” within the meaning of cl. 15 of the Letters Patent and is appealable. 5 C.W.N. 781 (P.C.)=24 A. 13. W

(8) Order refusing to make objector party, not appealable.

- (a) Under S. 588, cl. (2) of the C.P.C., an order rejecting an application under S. 32 to be made a party to a pending suit is not appealable. 13 C. 100; 2 A. 904. X

(b) Reading Ss. 53 and 86 of the Probate Act together an appeal lies to the High Court only in cases in which an appeal is allowable under the C.P.C. So, there is no appeal against an order refusing to make a person, who opposes probate, a party defendant to an application for probate. 21 C. 539 (*reversed* on appeal to the P. C. in 27 C. 521 on another point). Y

I.—“Appeals from orders of District Judge”—(Continued).

- (c) Under S. 588 (2), C.P.C., 1882, an appeal is allowed from an order striking out or adding the name of any person or plaintiff or defendant; but no appeal is allowed from an order refusing to add the name of a person. 12 C.P.L.R. 41 (42). **Z**

(9) Order admitting a person as caveator, whether appealable.

- (a) S. 86 of the Probate Act makes the C.P.C. applicable to orders passed under that Act. So, an order of the District Judge admitting a person as caveator under S. 69 of the Probate Act is appealable under S. 588, Cl. 2, C.P.C., Act XIV of 1882, 17 C. 48. *But see infra.* **A**

- (b) The section only allows an appeal to the High Court in cases in which an appeal is allowable under the C.P.C.; no appeal lies from an order admitting the respondent as caveator, as such an order is the same in effect as if it had made him a defendant in the suit. 4 O.C. 84 (86). **B**

(10) Order dismissing application for revocation on ground of want of interest is appealable.

An application under S. 50 of the Probate Act is considered to be a suit, and an order dismissing such application on the ground that the applicant had no *locus standi* to bring the suit is appealable to the High Court. 8 C.W.N. 748. **C**

(11) Order giving permission to dispose of immoveable property is appealable.

An order of a District Judge granting permission to the executor or administrator, for the disposal of immoveable property, under S. 90 of the Probate Act, is appealable. 28 C. 149=5 C.W.N. 443. **D**

(12) No appeal lies to the High Court on ground that the security accepted is insufficient.

By virtue of S. 86 orders of the District Court are made subject to appeal to the High Court under the rules contained in the C.P.C. so far as these rules are applicable. No provision is made by the C.P.C. for an appeal against an order of the District Judge founded on the ground that security insufficient in point of quality has been accepted. 20 C. 245. **E**

(13) Order refusing to grant discharge to the surety, is appealable.

A surety of an executor is entitled to be discharged from his liability as regards the future transactions of the latter, when the executor for whom he is surety, wastes the estate. As the effect of his discharge would be to revoke the probate, if fresh security is not furnished, an appeal lies against an order refusing to grant such discharge. 52 P.R. 1902=89 P.L.R. 1902. **F**

(14) Order refusing to amend error in the probate is appealable.

Though no appeal lies, either under S. 86, Act V of 1881, against an order refusing to amend a clerical error in the form of probate, on the ground that probate, was granted by the predecessor in office, the High Court may deal with the case under S. 622, C.P.C., and set aside the order. 27 C. 5, *following* 21 C. 539. **G**

I.—“*Appeals from orders of District Judge*”—(Concluded).

- (15) Order of Recorder of Rangoon rejecting application for probate is a final decree.

An order of the Recorder of Rangoon rejecting an application for probate is a final decree passed by him in the exercise of original civil jurisdiction.
24 C. 30=1 C.W.N. 8. H

- (16) Appeals to His Majesty-in-Council.

(a) As to appeals to His Majesty-in-Council, see Charters of Bengal, Madras and Bombay High Courts, S. 39, and Charter of N.W.P. High Court, S. 30. I

(b) An appeal from a final decree of the Recorder of Rangoon, where the estate is valued above Rs. 10,000, lies to the P.C. and not to the High Court.
24 C. 30=1 C.W.N. 8. J

- (17) Revision by High Court in testamentary matters.

The powers of revision given to a High Court by S. 622, C.P.C., 1882, can be exercised by it in testamentary proceedings. See 21 C. 539; 27 C. 5. K

- (18) Reference to High Court in testamentary proceedings.

As to this, see notes under S. 87, *infra*. L

- (19) Whether a review lies in testamentary proceedings.

As to this, see notes under S. 55, *supra*. M

[S. 264.]

Concurrent jurisdiction of High Court 1.

87. The High Court shall have concurrent jurisdiction with the District Judge in the exercise of all the powers hereby conferred upon the District Judge.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 264 of the Indian Succession Act, X of 1865. M-1

I.—“*Concurrent jurisdiction of High Court.*”

- (1) High Court, definition.

As to this, see notes under S. 52, *supra*. N

- (2) “High Court,” meaning in this section.

(a) The “High Court” in S. 87 of the Probate Act, is not merely confined to the appellate jurisdiction of that Court, but includes its original jurisdiction, and under that section the High Court exercising its original jurisdiction has concurrent jurisdiction with the District Judge for the purpose of exercising all powers provided by the Act.
5 C.W.N. 377: followed in 37 C. 224. O

I.—“*Concurrent jurisdiction of High Court*”—(Concluded).

(b) Thus the High Court of Calcutta has jurisdiction to grant probate and letters of administration, on the Original side, in any case which could have been brought before any District Judge in either of the two Provinces of Bengal. 37 C. 224. P

(3) **District Judge, definition.**

As to this, see S. 3, *supra*. Q

(4) **Existence of property within jurisdiction not necessary under S. 87.**

S. 87 does not require that any portion of the property should be within the limits of the Original Jurisdiction of the High Court; and Rule 740 of the Calcutta High Court which so requires cannot override the express provisions of S. 87 giving the High Court concurrent jurisdiction with the District Court. 37 C. 224. R

(5) **Chief Court of Punjab has no jurisdiction to extend a grant beyond the District Judge's jurisdiction.**

The Chief Court of Punjab has no jurisdiction to amend a grant of letters of administration granted by a District Judge so as to give it operation beyond the local limits of such District Judge's jurisdiction. 1 P.R. 1902 = 37 P.L.R. 1902. S

(6) **Reference to High Court in testamentary proceedings.**

A District Judge's order in a probate matter is not final. Still, where a District Judge erroneously referred a matter relating to probate, under S. 617, C.P.C., 1882, the High Court, acting under the concurrent jurisdiction accorded to it by S. 87, treated the matter as if originally brought before it. 6 C.L.R. 228 = 5 C. 756. T

N.B.—See also notes under Ss. 2 and 51, *supra*.

CHAPTER VI.

OF THE POWERS OF AN EXECUTOR OR ADMINISTRATOR.

88. An executor or administrator has the same power to sue in [S. 267.]

In respect of causes of action surviving deceased, and debts due at death.

respect of all causes of action that survive the deceased¹, and may exercise the same powers for the recovery of debts due to him at the time of his death, as the deceased had when living.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 267 of the Indian Succession Act X of 1865, but with the words “and may exercise the same powers for the recovery of debts” used in place of the words “and to distrain for all rents” of the latter Section. U

I—"An executor or administrator has the same power to sue in respect of all causes of action that survive the deceased."

(1) "Cause of action" meaning.

- (a) "Cause of action" means every fact which it is material to be brought to entitle the plaintiff to succeed; every fact which the defendant would have a right to traverse. 25 M. 736 (742). **Y**
- (b) It means the bundle of essential facts, which it is necessary for the plaintiff to prove before he can succeed in the case. 7 Bom. L.R. 20 (24) = 29 B. 368; 25 M. 736; 30 B. 167. **W**
- (c) It is the entire set of facts which gives rise to an enforceable claim. It comprises every fact, which a plaintiff, must, if traversed, prove in order to obtain judgment. 1 N.L.R. 4; 8 O.O. 389; 8 C.W.N. 207 (213) = 31 C. 274; 18 A. 131 (138) = 16 A.W.N. 2; 16 C. 98 = 15 I.A. 156; 16 A. 165 (170); 25 A. 48 (52); 7 Bom. L.R. 20 = 29 B. 368; 30 B. 167. **X**
- (d) It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. 8 C.W.N. 207 (213) = 31 C. 274; 18 A. 131 (138) = 16 A.W.N. 2; 16 C. 98 = 15 I.A. 156; 16 A. 165 (170); 25 A. 48 (52); see, also, *Read v. Brown*, 22 Q.B.D. 128; *Cooke v. Gill*, 8 C.P. 107. **Y**
- (e) It denotes all circumstances alleged by the plaintiff to exist, which, if proved or admitted, will entitle him to the relief prayed for. 21 M. 153 (156) = 8 M.L.J. 92; 31 C. 274; 16 A. 165 (170). **Z**
- (f) It has no relation whatever to the defence, which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour. 16 C. 98 = 15 I.A. 156; 18 A. 131 (138); 139 P.L.R. (1901); 57 P.R. 1907 = 66 P.W.R. 1907; 16 A.W.N. 2; 18 A. 432 (434); 21 M. 153 (156) = 8 M.L.J. 92; 25 M. 736 (739); 1 N.L.R. 4 (6); 8 O.O. 389 (393); 3 L.B.R. 56 (60); 28 P.R. 1907 = 93 P.L.R. 1908; 2 O.C. 17 (20); 11 C.L.R. 57 (62-70). **A**

(2) Cause of action—English decisions how far a guide.

- (a) The Courts in this country may safely follow the accepted decisions in England as to the meaning and definition of "cause of action." 8 C.W.N. 207 (213) = 31 C. 274; 18 A. 131 = 16 A.W.N. 2; 16 C. 98 = 15 I.A. 156; 16 A. 165 (170); 25 A. 48 (52); 22 C. 840; 12 M. 136; 6 C.W.N. 585 (588). **B**
- (b) Courts in this country are bound to accept the interpretation of "cause of action" laid down in English cases. *Per Bittleston, J.* in 3 M.H.C.R. 384. **C**

(3) Cause of action, how constituted.

- (a) To constitute a cause of action, there must be an infringement of a legal right. 12 M. 134. **D**
- (b) The term "cause of action" must be construed with reference to the substance rather than the form of the action. 19 C. 372 (379). **E**

(4) Cause of action—Under the Letters Patent.

The "cause of action" under the Letters Patent means the whole cause of action. 3 M.H.C.R. 384; 11 B. 649; 15 B. 93; 8 C. 483; 1 M. 375; 21 B. 126; 1 B. 23; 14 C. 256; 13 B.L.R. 91 = 21 W.R. 303; 12 B.H.C.R. 113. **F**

1.—“An executor or administrator has the same power to sue in respect of all causes of action that survive the deceased”—(Concluded).

(5) ‘Actionable claim,’ meaning.

For definition of “actionable claim,” see the Transfer of Property Act, IV of 1882, S. 130, as amended by S. 2 of Act II of 1900. **G**

(6) Powers and duties of executor, how long they extend.

(a) When probate is granted of the whole will and administration of the whole estate of the testator, they do not become ineffectual by degrees, as the various legatees die or obtain their legacies. Until the estate has been administered and the will carried into effect, the administration is incomplete and the executor is clothed with the powers given him by law. 1 Ind. Cas. 248. **H**

(b) See also notes under S. 4, *supra*. **I**

(7) When claims by or against executor or administrator as such may be joined with claims by or against him personally.

Claims by or against an executor or administrator as such, may be joined with claims by or against him personally, provided the last mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator. See Eng. Rules of the Supreme Court, 1883, O. 18, r. 5; C.P.C., 1908, O. 2, r. 5. **J**

(8) Whether beneficiary a necessary party to a suit by executor or administrator against a third person.

As to this, see C.P.C., 1908, O. 31, r. 1. **K**

(9) Acts which an executor may do before probate.

As to this, see notes under S. 12, *supra*. **L**

(10) Acts which an administrator cannot do before grant of letters.

As to this, see notes under S. 15, *supra*. **M**

(11) Defences to an action by an executor or administrator.

As to this, see notes under S. 82, *supra*. **M-1**

89. All demands whatsoever, and all rights to prosecute or defend any suit or other proceeding, existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators, except causes of action for defamation, assault as defined in the Indian Penal Code, or other personal injuries not causing the death of the party 2, and except also cases where, after the death of the party, the relief sought could not be enjoyed, or granting it would be nugatory. [S. 268.]

Demands and rights of suit of or against deceased survive to and against executor or administrator 1.

Illustration.

A collision takes place on a railway in consequence of some neglect or default of the officials, and a passenger is severely hurt, but not so as to cause death. He afterwards dies without having instituted any suit. The cause of action does not survive.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 268 of the Indian Succession Act, X of 1865, but the Illus. (b) of the latter Section is omitted. **N**

1.—“Demands and rights of suit of or against deceased survive to and against executor or administrator.”

A.—IN CONTRACT.

(1) General rule—Right of action founded on contract or duty, survives to the representative—English Law.

(a) It is a general rule with respect to such personal claims as are founded upon any obligation, debt, covenant or other duty, that the right of action on which the testator or intestate might have sued in his life-time survives his death, and is transmitted to his executor or administrator. 1 Will. Exors., 10th Ed., 604. **O**

(b) As a general rule, the executor represents the person of his testator with respect to all his rights and liabilities upon all his contracts. *Per Parke* B. in *Wills v. Murray*, 4 Ex. 865; see, also, 1 Will. Exors., 10th Ed., 605. **P**

(c) An executor or administrator can also sue on a contract made with the testator without the executor being named, although the action does not accrue till after his death. 1 Will. Exors., 10th Ed., 667. **Q**

(2) Do.—Indian Law.

In India, promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the context. See S. 37 (2), Indian Contract Act IX of 1872. **R**

(3) General rule—Right of action founded on contract or duty survives against the representatives—English Law.

It is a general rule with respect to such personal claims as are founded upon any obligation, contract, debt, covenant or other duty, that the right of action on which the testator or intestate might have been sued in his life-time, survives his death, and is enforceable against his executor or administrator. II Will. Exors., 10th Ed., 1846. **S**

(4) Do.—Indian Law.

In India, if it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it. See S. 40, Indian Contract Act, IX of 1872. **T**

(5) Cases of implied contracts and duties.

In cases of implied contract or of obligation or duty arising from the relation of the parties, though the breach may be treated as a substantive wrong to the person or property, the action does not die with the person and the executor may sue or be sued in respect of the personal estate of the deceased; as in cases of carriers, bailees, inn-keepers and the like, in which the action may be framed either in contract or in tort. Leake on Contracts, IVth Ed., 891, citing *Knights v. Quarles*, 2 B. & B. 102; *Bradshaw v. L. & Y. Ry.*, 10 C.P. 189, *Leggott v. G. N. Ry.*, 1 Q.B.D. 599. **U**

I.—Demands and rights of suit of or against deceased survive to and against executor or administrator”—(Continued).

A.—IN CONTRACT—(Continued).

(6) Executory contracts of the deceased.

- (a) An executor is entitled to the benefit of the executory contracts of the deceased for the supply of goods or performance of work which do not involve the personal skill and ability of the deceased. Leake on Contracts, 4th Ed., 893, 894; *citing Werner v. Humphreys*, 2 Man. & G. 353; *Wentworth v. Cock*, 10 A. & E. 42. **Y**
- (b) Contingent and executory interests are also transmissible to executors or administrators, except where the being in existence when the contingency happens is an essential part of the description of the person who is to take. 1 Will. Exors., 10th Ed., 672. **W**

(7) Contracts relating to the person.

- (a) Contracts involving personal relations or qualities are for the most part determined by death. Leake on Contracts, 4th Ed., 896, *citing, Siboni v. Kirkman*, 1 M. and W. 418. **X**
- (b) Generally speaking, contracts bind the executor or administrator, though not named. Where, however, personal considerations are of the foundation of the contract, as in cases of principal and agent and master and servant, the death of either party puts an end to the relation; and in respect of service after the death, the contract is dissolved, unless there be a stipulation express or implied to the contrary. *Per Willes, J. in Farrow v. Wilson*, 4 C.P. 744 (746). **Y**
- (c) Where the personal quality of the party with whom a contract is made, is a material ingredient in the contract, the right to enforce specific performance, ceases upon the death of the person with whom the contract is effected; and his legal representative is not entitled to claim such right. 30 C. 265 = 7 C.W.N. 229. **Z**

(8) Contract of marriage.

Promises to marry are necessarily terminated by the death of either of the contracting parties, but the executor can sue for any special damage that has accrued to the personal estate from the breach. Leake on Contracts, 4th Ed.; *citing Chamberlain v. Williamson*, 2 M. and S. 408; *Finlay v. Chirney*, 20 Q.B.D. 494; 1 Will. Exors., 10th Ed., 618; 11 Will. Exors., 10th Ed., 1350. **A**

(9) Contracts of agency and service.

Contracts of agency and contracts of service are determined by the death of the principal, agent, master or servant, as the case may be, unless provision is made by the contract for prolongation of the authority or of employment by the representatives of the master. Leake on Contracts 4th Ed., 897; 1 Will. Exors., 10th Ed., 605; 11 Will. Exors., 10th Ed., 1351. **B**

(10) Bills and Notes.

(i) RIGHTS AND LIABILITIES OF EXECUTOR OR ADMINISTRATOR.

- (a) Executors and administrators take all the rights and liabilities on bills and notes, to which the deceased was a party at the time of his death; and they may sue or be sued in their representative character. Leake on Contracts, 4th Ed., 891, 892. **C**

1—"Demands and rights of suit of or against deceased survive to and against executor or administrator"—(Continued).

A.—IN CONTRACT—(Continued).

- (b) On the death of the holder of a bill, the title thereto passes to his personal representatives. Chalmers on Bills, 6th Ed., 129, *citing Rawlinson v. Stone*, 3 Wills. 1 Exch. *Bishop v. Curtis*, 21 L.J.Q.B. 391. **D**

(ii) ENDORSEMENT BY EXECUTOR OR ADMINISTRATOR.

- (a) An executor or administrator under obligation to indorse a bill as such may indorse in such terms as to exclude personal liability. See S. 31 (5) of the English Bills of Exchange Act, 1882. **E**

- (b) An executor or administrator cannot by his delivery complete an indorsement written by the deceased. He must indorse it *de novo*. Chalmers on Bills, 6th Ed., 129; see *Bromage v. Lloyd*, 1 Exch. 32. **F**

(iii) PRESENTMENT OF BILL FOR ACCEPTANCE TO PERSONAL REPRESENTATIVE.

- As to this, see S. 41 (c) of the English Bills of Exchange Act, 1882, and also S. 75 of the Negotiable Instruments Act XXVI of 1881. **G**

(iv) PRESENTMENT OF BILL FOR PAYMENT TO PERSONAL REPRESENTATIVE.

- As to this, see S. 45 (7) of the English Bills of Exchange Act, 1882, and also S. 75 of the Negotiable Instruments Act, XXVI of 1881. **H**

(v) AUTHORITY OF EXECUTOR OR ADMINISTRATOR TO FILL UP INCHOATE BILL.

- As to this, see S. 20, English Bills of Exchange Act, 1882, and *Scard v. Jackson*, 34 L.T.N.S. 65. **I**

(11) Death of surety, how far a revocation of the contract of guarantee.

- As to this, see De Colyar on Guarantee and Surety, 3rd Ed., 392-394; S. 181, Indian Contract Act IX of 1872. **J**

(12) Effect of death of partner as regards surviving partners and the executors of the deceased partner.

- As to this, see Lindley on Partnership, 7th Ed., 650-654. **K**

(13) Effect of death of a partner as regards creditors of the firm.

- As to this, see Lindley on Partnership, 7th Ed., 654-672. **L**

(14) Effect of death of a partner as regards rights of separate creditors and legatees.

- As to this, see Lindley on Partnership, 7th Ed., 672-683. **M**

(15) Non-liability of deceased partner's estate as regards subsequent obligations.

- As to this, see S. 261, Indian Contract Act IX of 1872. **N**

(16) Effect of death of a share-holder of a Company as regards the Company and the executors of the deceased.

- As to this, see Lindley on Companies, 6th Ed., 731-734. **O**

(17) Effect of death of a share-holder as regards the creditors of the Company.

- As to this, see Lindley on Companies, 6th Ed., 735. **P**

(18) Effect of death of a share-holder as regards the rights of the separate creditors and legatees of the deceased.

- As to this, see Lindley on Companies, 6th Ed., 736-745. **Q**

I.—Demands and rights of suit of or against deceased survive to and against executor or administrator''—(Continued).

A.—IN CONTRACT—(Continued).

(19) Actions on contracts made by executor himself.

(a) An executor is *personally* liable upon all contracts made after the death of his testator, as being in fact the contracting party unless he restricts them expressly to payment out of the estate, nor can the creditor under such contract charge him upon it as executor, or acquire any claim against the estate of the deceased. Leake on Contracts, 4th Ed., 898. **R**

(b) Thus, where a banker advances money to an executor, he can charge him only personally and not as executor, although the advance is made upon an executorship account and for the purpose of the estate. *Ashby v. Ashby*, 7 B. and C. 444; *Farhall v. Farhall*, 7 Ch. 123. **S**

(c) So, if an executor or administrator draws or indorses a bill or note, purporting to do so in his representative capacity, he is personally liable, unless it is expressly restricted to payment out of the estate; and such an instrument gives no claim against the estate of the testator. *Per Buller, J.*, in *King v. Thom*, 1 T.L.R. 487. **T**

(d) Upon a contract of borrowing made by an executor after the death of the testator, the executor is only liable *personally* and cannot be sued as executor so as to get execution against the assets of the testator. 31 C. 253=8 C.W.N. 135. **U**

(e) So, in a suit on a promissory note given by only one of several executors, after the death of the testator, for goods apparently supplied to the estate, *held* that the estate of the testator is not liable for it. 31 C. 253=8 C.W.N. 135. **Y**

(f) In the absence of any special power given by the will, an executor cannot render the estate liable for moneys borrowed by him for the purposes of the estate. 7 C.W.N. 104, *referring to Farhall v. Farhall*, 7 Ch. D. 123. **W**

(g) A claim for money lent to the executors to discharge the testator's debts, can be enforced against them personally; a judgment cannot lie directly against the assets of the testator. 11 Bom. L.R. 250=2 Ind. Cas. 161. **X**

(h) An executor can be sued in his representative capacity on a contract made by him only when the consideration for such contract was a contract or transaction with the testator. 27 C. 683 (690). **Y**

(i) So where an executrix executed *hatchittas* in renewal of those executed by the testator, with compound interest in accordance with the practice followed by the testator, *held* that such *hatchittas* were binding on the estate of the testator. (*Ibid.*) **Z**

(j) Although an executor is ordinarily liable personally in respect of contracts made by him, he is entitled to be indemnified out of the estate, if the contracts are for the benefit of the estate. Ph. & Trev. 432. **A**

(k) See also notes under S. 104, *infra*. **B**

N.B.—In English Law, a promise by an executor or administrator to pay a debt of the testator or to answer damages, will not make him *person-*

1. — Demands and rights of suit of or against deceased survive to and against executor or administrator” — (Continued).**A.—IN CONTRACT—(Concluded).**

ally liable, unless (a) there is a sufficient consideration to support the promise, and (b) the promise is in writing, as required by the Statute of Frauds. 29 Car. II C. 3 S. 4; II Will. Exors., 10th Ed., 1417. C

(20) Actions of contract made with the executor.

(a) With regard to contracts made with him in his representative character, an executor or administrator may sue as such as well as in his own name. I Will. Exors., 10 Ed., 661. D

(b) Wherever the money recovered will be assets, the executor may sue for it in his representative character. I Will. Exors., 10th Ed. 663. E

(21) When an executor is personally bound by a decree.

An executor who is sued as such only, cannot in his personal capacity be prejudiced by any decree which may be passed in the suit. In order that he may be personally bound, he must be sued in his personal as well as in his representative capacity. 31 A. 82 (F.B.) = 6 A.L.J. 71 = 5 M.L.J. 185 = 1 Ind. Cas. 416. F

B.—IN TORT.**(1) General rule—Right of action founded on tort dies with the death of either party.**

In England, at Common Law, according to the maxim “*actio personalis moritur cum persona*” the death of either the tort-feasor or the injured party puts an end to the right of action for tort, even if an action was commenced in his life-time. Pollock on Torts, 6th Ed., 60; Clerk and Lindsell on Torts, 3rd. Ed., 49; I Will. Exors., 10th Ed., 606. G

(2) Exception to the above rule.

“The only cases in which, apart from question of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to us to be those in which property or the proceeds or value of property belonging to another have been appropriated by the deceased person and added to his own estate or moneys.” *Phillips v. Homfray*, 24 Ch. D, 439, cited in 13 B. 677 (680). H

(3) Statutory right of action of the representatives of the injured person—English Law.

(i) St. 4. Edw. III, C. 7 and 15 Edw. III, C. 5, gave executors and administrators a right of suit for *trespass* to the deceased, *trespass* including all torts rendering the *personal* estate less beneficial. I

(ii) St. 3 and 4, Will. IV, C. 42, S. 2 gave executors and administrators a right of suit for *all* torts to the real estate of the deceased, provided the injury was committed within six months before the death of the deceased and the action is brought within one year after the death. See *Twycross v. Grant*, 4 C.P.D. 45; *Hatchard v. Mege*. 18 Q.B.D. 771. J

1.—Demands and rights of suit of or against deceased survive to and against executor or administrator?—(Continued).

B.—IN TORT—(Continued).

- (iii) St. 9 and 10, Vict. C. 93 (Lord Campbell's Act or Fatal Accidents Act) gave a right of action to the executors or administrators of a person whose death has been caused by a wrongful act, neglect or default, such that if death had not occurred, that person might have maintained an action—such right of action being given for the benefit of the wife or husband, parent or child of the deceased. **J1**
- (iv) By St. 27 and 28, Vict. C. 95, S. 1 the right of action given by Lord Campbell's Act was given directly to the persons for whose benefit it was originally given, if no action was brought by the executor or administrator within months after the death. **J2**
- (v) St. 43 and 44, Vict. C. 42 (Employers' Liability Act) gave a right of action to the legal personal representative of a deceased workman against his employer for injury resulting in death. **J3**
- (vi) St. 60 and 61, Vict. C. 37, amended the last mentioned Act, and St. 63 and 64, Vict. C. 22, extended the benefits of the former Act. **K**

(4) Statutory right of action of the representatives of the injured person—Indian Law.

- (i) In India by the Legal Representatives' Suits Act, XII of 1855, an action lies by executors or administrators and representatives of a deceased person for any wrong committed in his lifetime which has occasioned pecuniary loss to the estate, and for which wrong an action might have been maintained by the deceased, provided the wrong was committed within one year before the death. **K1**
- (ii) By the Fatal Accidents Act, XIII of 1855, corresponding to the English Lord Campbell's Act, an action lies by the executors or administrators and representatives of a person whose death has been caused by the wrongful act, neglect or default of another, such that, if death had not issued, such person might have maintained an action, provided the action is brought within one year after the death. **L**

(5) Cases under Act XIII of 1855.

For cases under the above Act, see 28 C. 401; 7 B.H.C.R. o.c. 113; 8 B.H. C.R. o.c. 130; 1 A. 60; 16 B. 254. **M**

(6) Mode of assessing damages in a suit under Act XIII of 1855.

For mode of assessing damages in a suit for compensation for destruction of life under Act XIII of 1855, see 1 A. 60; 2 C.W.N. 609; 16 B. 254; 7 B.H.C. o.c. 113; 8 B.H.C. o.c. 130. **N**

(7) Statutory right of action against the representatives of the tort-feasor—English Law.

By St. 3 and 4, Will. IV, C. 42, S. 2, as subsequently amended, the executors and administrators of a deceased person may be sued for any injury committed by the deceased in his lifetime to the real or personal property of another if the injury was committed within 6 months before the death and the action is brought within 6 months after the appointment of executor or administrator. **O**

I.—“Demands and rights of suit of or against deceased survive to and against executor or administrator”.—(Continued).

B.—IN TORT—(Concluded).

(8) Statutory right of action against the representatives of the tort-feasor—Indian Law.

In India, by the Legal Representatives' Suits Act, XII of 1855, an action lies against the executors or administrators and representatives of a deceased person for any wrong committed by him in his lifetime for which he would have been subject to an action, provided such wrong was committed within one year before the death. P

(9) Construction of Act XII of 1855.

(a) Act XII of 1855 applies to suits for wrongs, which, did not survive to or against legal representatives before the passing of that Act. 2 N.W.P. H.C.R. 103. Q

(b) Act XII of 1855 relates only to wrongs which do not survive to the representatives of a deceased person. 1 W.R. 251. R

(10) Personal injury independent of contract.

Where the cause of action is an injury to the person independent of contract, the executor cannot recover the expense the deceased was put to in his lifetime by reason of the injury: *e.g.*, the cost of medical attendance. *Pulling v. G. E. Ry.*, 9 Q.B.D. 110, cited, in 1 Will. Exors., 10th Ed., 607, 608. S

(11) Debts implied from wrongs.

(a) In England, the Common Law rule that the wrong dies with the person does not apply to the implied debt arising from pecuniary benefit received by the wrongdoer. Leake on contracts, 4th Ed., 890. S1

(b) So, where goods have been wrongfully taken and converted by the wrongdoer to his own use, the implied debt which arises on a waiver of the tort for the value of the property survives to the executor, provided the claim arises in respect of some definite property wrongfully taken and appropriated, and the debt is capable of being ascertained and followed against the estate of the wrongdoer. *Ibid.*, citing *Phillips v. Homfray*, 24 C.D. 439. T

(12) Actions for torts done in the executor's time.

(a) For any injury done to the goods of the testator, an executor or administrator may bring an action either in his representative capacity or in his own name in his individual character. 1 Will. Exors., 10th Ed., 659. T1

(b) He can maintain such an action although the injury was done before probate or administration is granted. 1 Will. Exors., 10 Ed., 467, *et seq.* U

C.—EXAMPLES OF CAUSES OF ACTION HELD NOT TO SURVIVE THE DEATH OF THE PARTY.

(1) Suit to recover possession of minors illegally detained.

A suit to recover possession of plaintiff's minor daughters alleged to be illegally detained by the defendant, does not, on defendant's death, survive against his widow. 25 B. 574. Y

- 1.—“*Demands and rights of suit of or against deceased survive to and against executor or administrator*”—(Continued).

C.—EXAMPLES OF CAUSES OF ACTION HELD *NOT* TO SURVIVE THE DEATH OF THE PARTY—(Concluded).

- (2) **Suit to recover expenses caused to temple by misconduct of its officer.**

A suit by an officer of a temple against another officer for loss of income and for expenses caused to the temple by the latter's misconduct, was held not to survive against his legal representative, it not appearing that the deceased defendant left any personal assets or that his estate was benefited by his misconduct. 8 M.L.J. 180. **W**

- (3) **Suit on claim founded on personal trust.**

A claim founded upon personal trust does not survive to a representative. 23 B. 719. **X**

- (4) **Suit to set aside plaintiff's father's alienation.**

Where, in a suit by a Hindu minor son to set aside his father's alienation of ancestral property, the plaintiff died, it was *held* that the right to sue did not survive in favour of his mother. 4 A. 235 = 2 A.W.N. 29. **Y**

D.—EXAMPLES OF CAUSES OF ACTION HELD TO SURVIVE THE DEATH OF THE PARTY.

- (1) **Suit on compromise entered into before plaintiff's death.**

Though a suit would have abated on the plaintiff's death, yet, if the compromise gave her some rights, her heirs will be entitled to prosecute the suit. 5 C.W.N. 242 = 28 C. 155. **Z**

- (2) **Suit on promise to settle property on adoptee.**

Where a Hindu by an express promise to settle his property upon a boy, induced his parents to give him in adoption but died without executing such settlement, *held*, the equity to compel the heir and legal representatives of the adoptive father specifically to perform his contract, survived. 2 B. 67. **A**

- (3) **Suit for pre-emption.**

A suit for pre-emption brought by a land-owner respecting village lands should not be regarded as a merely personal action, which must terminate on the death of the original plaintiff, not surviving to the representatives. 98 P.R. (1898). **B**

- (4) **Suit by Hindu widow for possession of her husband's estate.**

A suit by a Hindu widow to recover possession of her husband's estate does not abate on her death. 17 W.R. 475; 8 B.L.R. 98. **C**

- (5) **Suit for damages for trespass.**

A cause of action for damages for trespass survives. 1 B.L.R. o. c. 42. **D**

- (6) **Suit for money had and received by agent.**

A cause of action accruing against an agent for money received and accounts kept survives the death of the agent. 10 W.R. 59. **E**

1.—“Demands and rights of suit of or against deceased survive to and against executor or administrator”—(Concluded).

D.—EXAMPLES OF CAUSES OF ACTION HELD TO SURVIVE THE DEATH OF THE PARTY—(Concluded).

(7) Suit for damages for negligence by solicitor.

Negligence by a solicitor is a wrong arising out of a breach of duty to be performed, and an action for damages for such negligence survives even after the death of the solicitor and may be brought against his executor. *Davies v. Hood*, 88 L.T. 19=7 C.W.N. cxciv. F

(8) Suit for damages for malicious prosecution.

(a) A suit for damages for malicious prosecution originally brought against the wrong-doer himself cannot be subsequently continued against his heir. 13 B. 677 : *But see infra*. G

(b) It is unnecessary to go into English cases upon the question whether or not, the cause of action, survives to the legal representative of a deceased plaintiff, for malicious prosecution. 31 C. 993=8 C.W.N. 745. H

(c) S. 89 of the Probate Act governs suits for malicious prosecution. Such suits, on plaintiff's decease, survive to his legal representative. 31 C. 993=8 C.W.N. 745, *reversing* 31 C. 406=8 C.W.N. 329. I

(d) A suit for malicious prosecution falls within the general words of the section, and not within the exception “personal injury not causing death to the party” which refers only to physical injuries to the person. 31 C. 993=8 C.W.N. 745. J

2.—“Except causes of action for defamation, assault, . . . or other personal injuries not causing the death of the party.”

(1) Exception to the section must be construed strictly.

The exception to the section ought to be construed strictly. 31 C. 993=8 C.W.N. 745. K

(2) ‘Assault,’ definition in I.P.C.

For definition of “assault” in the Indian Penal Code, see S. 351, I.P.C., Act XLV of 1850. L

(3) “Personal injuries,” meaning.

“Personal injuries” in the exception to S. 89 refers only to physical injuries to the person. 31 C. 993=8 C.W.N. 745. M

Miscellaneous.

(1) Revival of suit—Cause of action.

Where it is sought to revive a suit on the death of the plaintiff, the cause of action of the original and the revived suit must be the same; and no fresh cause of action can be imported into the revived suit. 22 C. 92. N

(2) Executor can sue for debts due to the estate, though probate necessary before decree.

An executor named in the will has the power to file suits if necessary to recover debts due to the estate; he cannot obtain a decree until his position is confirmed by probate; but limitation will be saved. 2 Ind. Cas. 693. O

Miscellaneous.—(Concluded).

- (3) Probate is necessary before executor *can be sued* as such.

Probate is necessary before an executor can be sued as such, and as representing the testator's estate. An executor cannot be made liable, until he has accepted the position of executor, and he cannot be said to have fully accepted that position until he obtains probate. A decree made against an executor, as such, before probate is granted will not bind estate. 2 Ind. Cas. 818. P

- (4) Pending suit may be continued by legal representative though grant not obtained.

Where the cause of action survives, a suit may, notwithstanding the death of the original plaintiff, be continued by his legal representative, although the latter has not taken out administration to the original plaintiff's estate. 16 B. 519. Q

- (5) Suit by agent of undisclosed principal, who should continue it.

Where a suit is one properly brought by a person as agent of an undisclosed principal, it should, after the death of the agent, be continued, if at all, by his representative, and not by the principal. 17 M.L.J. 116. R

- (6) Decree or execution against person in possession of estate of testator before grant of probate, how far valid.

As to this, see notes under S. 12, *supra*. S

- (7) In cases governed by the Succession Act, a decree obtained against an heir in possession before the grant of administration is not valid and binding on the estate.

As to this, see notes under S. 14, *supra*. T

90. (1) An executor or administrator has, subject to the provisions of this section, power to dispose, as he thinks fit, of all or any of the property for the time being vested in him under section 4 ¹. [S. 269]

Power of executor or administrator to dispose of property.

sions of this section, power to dispose, as he thinks fit, of all or any of the property for the time being vested in him under section 4 ¹.

(2) The power of an executor to dispose of immoveable property so vested in him is subject to any restriction which may be imposed in this behalf by the will ² appointing him, unless probate has been granted to him and the Court which granted the probate permits him ³ by an order in writing, notwithstanding the restriction, to dispose of any immoveable property specified in the order in a manner permitted by the order.

(3) An administrator may not, without the previous permission of the Court by which the letters of administration were granted ⁴,—

- (a) mortgage, charge or transfer by sale, gift, exchange or otherwise any immoveable property for the time being vested in him under section 4, or
- (b) lease any such property for a term exceeding five years.

(4) A disposal of property by an executor or administrator in contravention of sub-section (2) or sub-section (3), as the case may be, is voidable ⁵ at the instance of any other person interested in the property ⁶.

(5) Before any probate or letters of administration is or are granted under this Act there shall be endorsed thereon or annexed thereto a copy of sub-sections (1), (2) and (4), or of sub-sections (1), (3) and (4), as the case may be.

(6) A probate or letters of administration shall not be rendered invalid by reason of the endorsement or annexure required by the last foregoing sub-section not having been made thereon or attached thereto, nor shall the absence of such an endorsement or annexure authorize an executor or administrator to act otherwise than in accordance with the provisions of this section.

(Old Acts).

Act VI of 1889.—S. 14 of this Act substituted the present section 90 in place of the original section which ran as follows :—

“An executor or administrator has power, with the consent of the Court by which the probate or letters of administration was or were granted, to dispose of the property of the deceased, either wholly or in part, in such manner as he thinks fit :

Provided that the Court may, when granting probate or letters of administration, exempt the executor or administrator from the necessity of obtaining such consent as to the whole or any specified part of the assets of the deceased.”

(Notes).

General.

(1) State of law before amendment of S. 90.

Under S. 90 before it was amended by Act VI of 1889, an executor could not dispose of any property without the consent of the Court. See S. 90, Act V, of 1881. U

(2) Disposal of property by executor or administrator without Court's permission, before the amendment of the section—Effect.

The disposal of property by an executor or administrator who was appointed before Act VI of 1889 came into force, and to whom the provisions of S. 90 were applicable, is not void by reason only that the consent of the Court was not obtained to the disposal. See S. 19, Act VI of 1889 ; 3 C.W.N. 488. Y

N.B.—S. 19 of Act VI of 1889 protects dispositions of property by executor or administrator appointed before the commencement of the Act, notwithstanding that the consent of the Court had not been obtained to such disposition.

(3) Corresponding Indian Law.

This section corresponds to S. 269 of the Indian Succession Act, X of 1865, but contains in addition clauses (2) to (6). W

General—(Concluded).

(4) Difference between this section and S. 269 of the Succession Act.

- (a) The Probate and Administration Act, S. 90, gives a much less extensive power to deal with the testator's property, than what is given to executors by S. 269 of the Succession Act. See *Hend.*, 3rd Ed., 333. **W 1**
- (b) An administrator under the Probate Act, has, in respect to his power of dealing with immoveable property, been reduced to the level of a manager under the Guardian and Wards Act, VIII of 1890, if not still lower. See *Majumdar*, 610. **W 2**
- (c) The reason for this marked distinction is because the Legislature thought it unsafe to extend to executors and administrators in the *mofussil*, the full powers conferred by the Succession Act. *Hend.*, 3rd Ed., 333. **W 3**

(5) The Succession Act, unlike the Probate Act, makes no difference between moveable and immoveable property.

- (a) Executors under a will have, under S. 269 of the Succession Act,—which makes no difference between moveable and immoveable property—power to dispose of the property of the testator either wholly, or in part, in such manner as they think fit. 1 A. 710 (F.B.). **W 4**
- (b) But the Probate and Administration Act makes a difference between moveable and immoveable property as regards the power of disposition of executors and administrators. See *cls.* (2) and (3) of S. 90. **X**

(6) Ss. 62 and 90 do not protect purchasers from persons whose grant is void.

Ss. 62 and 90 are not intended to afford protection to unwarrantable and fraudulent dispositions by an administrator whose title rests on a grant absolutely void. *Per Mitra, J.* in 33 C. 713 = 3 C.L.J. 422 = 10 C.W. N. 673 = 10 Bom.L.R. 648 = 18 M.L.J. 367 = 35 C. 955. **Y**

(7) Section does not apply after estate fully administered.

- (a) The section has no application where the estate has been fully administered, all the debts collected and all legacies paid. 9 C.L.J. 116. **Z**
- (b) Thus, it cannot be said that where the widow is herself the administratrix, the estate being charged with her maintenance, is not fully administered till her death. (*Ibid.*) **A**
- (c) See, also, notes under S. 4, *supra*, under the heading "Powers and duties of executor, how long they extend." **A1**

(8) Executor's power of disposition lost after property made over to legatees.

The executor's power of disposition would be lost after he had made over the property to legatees. *Ph. and Trev.* 406. **B**

I.—"An executor or administrator has, . . . power to dispose, . . . of the property for the time being vested in him under section 4."

(1) "Power to dispose" whether it includes a power of mortgage.

- (a) "A power to dispose" would include any disposition by way of sale, mortgage, charge, exchange or lease. It might also include a power of gift, but this power would be dependent upon the consent of the beneficiaries. *Ph. and Trev.* 405, but see *infra*. **B1**
- (b) An authority "to dispose" of property does not give authority to mortgage it. 14 B. 590. **C**

1.—“An executor or administrator has, . . . power to dispose, . . . of the property for the time being vested in him under section 4 ”—(Ctd.).

(2) “Power to mortgage” does not authorise a sale.

A power to mortgage does not authorise a sale, though it authorises a mortgage with power of sale. *Cook v. Dawson*, 29 Beav. 123; *Bridges v. Longman*, 24 Beav. 27; *In re Chawner's Will*, 9 Eq. 569, cited in Theob. 1 A. 710 (719). D

(3) “Power of sale” includes power to mortgage with right of sale.

(a) Where executors have a power of sale, they have authority to execute a mortgage with a power of sale in favour of the mortgagee. 1 A. 710 (F.B.). E

(b) In England, an executor may mortgage with a power of sale property which wholly vests in him. *Russell v. Plaice*, 18 Beav. 21; cited in 1 A. 710 (719). F

(c) Where a will gave the executor power to sell the property to pay off debts incurred by the testator, or if the property was a losing concern, the executor was held to have power under S. 90 of the Probate Act, to mortgage the property in case of necessity. 8 C.W.N. 362. G

(4) Executor cannot exercise a power of sale by attorney.

(a) Executors cannot exercise a power of sale by attorney. *Combe's case*, 9 Co., 75 (b); cited in 1 Will. Exors., 10th Ed., 712. H

(b) An executrix is not competent to exercise the power of sale given her by will, by an attorney. A power of attorney, in so far as it delegates to an attorney power to exercise the discretion vested in an executrix, is void. 18 C.W.N. 1190. I

(5) Power of sale of executor or administrator under English Law.

(a) An executor or administrator has an absolute power of disposal over the whole personal effects of his testator or intestate, and they cannot be followed by creditors, much less by legatees, either general or specific, into the hands of the alienee. 1 Will., Exors., 10th Ed., 700; see *Earl Vane v. Rigden*, 5 Ch. 663; *Cruikshank v. Duffin*, 13 Eq., 555; *Berry v. Gibbons*, 8 Ch. 747; *In re Whistler*, 35 Ch. D. 561. J

(b) An executor has power to dispose even of chattels or real estate specifically bequeathed. 1 Will. Exors., 10th Ed., 301. K

(6) Power of mortgage of executor or administrator under English Law.

(a) An executor or administrator has power to mortgage the assets, whether it be of legal or equitable assets or of mere choses-in-action, and whether it be by actual assignment or by deposit; and the mortgage may also give the mortgagee a power of sale. 1 Will. Exors., 10th Ed., 702, citing *Nugent v. Giffard*, 1 Atk. 463; *Graham v. Drummond*, 1896, 1 Ch. 968; *Scott v. Tyler*, 2 Dick. 724; *Vane v. Rigden*, 5 Ch. 667; *Russell v. Plaice*, 18 Beav. 21. L

(b) An executor has power to mortgage the property of the testator unless prohibited by the terms of the will. 3 C.L.J. 260 (266). M

(7) Presumption in favour of purchaser or mortgagee from executor or administrator.

As to this, see notes under S. 84, *supra*.

N

1.—“An executor or administrator has,....power to dispose,....of the property for the time being vested in him under section 4”-(*Contd.*).

(8) Title of purchaser or mortgagee from executor or administrator.

(a) If an executor, who is also residuary legatee, sells or mortgages an asset for valuable consideration to a person who has no notice of the existence of unsatisfied debts of the testator, or of any ground which renders it improper for the executor so to deal with the asset, the purchase or mortgage is valid as against any unsatisfied creditor of the testator. 1 Will. Exors., 10th Ed., 705—706 ; citing *Per Romer, J.* in *Graham v. Drummond*, 1896, 1 Ch. 968 (974). O

(b) A purchaser of immoveable property from an administrator acquires an absolute title to it, 27 B. 103=4 Bom. L.R. 849. P

(9) Purchaser or mortgagee from executor or administrator not bound to make inquiry or see to application of purchase-money.

(i) Where there is no restriction in the will, a *bona fide* purchaser or mortgagee need not inquire into the necessity for the transaction. Ph. & Trev. 407. Q

(ii) A purchaser from a Hindu executor is not obliged to see to the exact amount of the debts which the testator directed him to pay, or even to make inquiry whether any such debts actually existed. He is not obliged to look further than the will itself ; and if the will gave the executor authority to pay debts out of the estate, the purchaser might safely rely on the executor's power to convey. *Per Phear, J.*, in 10 B.L.R. 271-n (274). R

(iii) Where, in order to save an estate from sale in execution of a decree against the testator, his executor raised a loan from the plaintiff giving him a mortgage of the testator's property, *held* that even if the executor had funds to pay plaintiff the debt without raising a loan, that fact would not invalidate the plaintiff's claim against the estate, unless there was good reason to infer that he knew of those funds, or might have known of them, if he had exercised ordinary diligence in making inquiries on the point. 1864 W.R. 99. S

(iv) An executor has authority to sell or mortgage the property of the testator in due course of administration, and give a complete title free from the charge or trust to a purchaser or mortgagee. Such a purchaser or mortgagee is not bound to inquire whether the legacies charged on his estate by the testator have been paid or not, and he must be presumed to have obtained a free, complete and valid title unless it is clearly proved that he had *express or constructive* notice that a certain other person had claims against the estate and the executor was acting in breach of the trust. 6 Bom. L.R. 800 ; following *In re Whistler*, 35 Ch. D. 561 ; *Corser v. Cartwright*, 7 H.L. 743 ; 4 C. 897. T

(v) When an order of the Court has been made authorising the guardian of an infant to raise loan on the security of the infant's estate the lender of the money is entitled to trust to that order, and is not bound to inquire into the expediency or necessity of the loan for the benefit of the infant's estate—in the absence of knowledge of fraud or underhand dealing. 11 C. 379 (383)=12 I.A. 50. U

1.—“An executor or administrator has, . . . power to dispose, . . . of the property for the time being vested in him under section 4” —(Ctd.).

- (vi) Unless it is shown that a mortgagee from an executor had notice that the executor was exceeding his powers, or had been put upon inquiry, he is entitled to a decree against the estate. He is not bound to enquire whether the executor is mortgaging the estate for the proper purposes of administration, unless there are special circumstances to put him upon enquiry. 1 Ind. Cas. 248. Y
- (vii) The principle of English Law laid down in *In re Tanquerly*. Williams and London (20 Ch. D. 465) to the effect that, if the mortgage is executed by the executor more than twenty years after the testator's death, the mortgagee ought to inquire into the necessity of the loan, is not supported by any authority in India. 1 Ind. Cas. 248. W
- (viii) See also notes under S. 84, *supra*. X
- (10) Sale or mortgage in satisfaction of private debt of executor, how far valid.**
- (a) A sale or mortgage of a specific legacy by an executor who is also specific legatee in satisfaction of his private debt is valid, unless it can be shown that the purchaser or mortgagee knew that there were debts unpaid. *Taylor v. Hawkins*, 8 Ves. 209; *Hall v. Andrews*, 27 L.T. 195. Y
- (b) A mortgage by an executor who is also residuary legatee to secure his private debts may be set aside even at the suit of a pecuniary legatee, for, the nature of the claims of legatees, they taking under the will, may be ascertained from the will. But as to creditors, it is different. If a reasonable time has elapsed since the death of the testator, and then the executor deals with the residue as his own, the purchaser may, in the absence of notice to the contrary, assume that the debts have been paid, or that there are other assets for payment of the debts, if any; therefore, the mortgagee would be safe as against creditors, but not as against pecuniary legatees. 12 C.W.N. 993 (P.G.) = 4 M.L.T. 201 = 33 B. 1 = 18 M.L.J. 435 = 5 A.L.J. 661 = 10 Bom. L.R. 665 = 8 C.L.J. 345 = 1 Ind. Cas. 369; referring to *Graham v. Drummond*, 1896, 1 Ch. 968; *In re Queale's Estate*, 17 Ir. 361; *Spence's Equitable Jurisdiction*, Vol. II, p. 376. Z
- (c) So, where the executors of a will who were also residuary legatees mortgaged to a Bank certain property subject to a charge under the will and the Bank dealt with them not as executors but as persons pledging their own property for their own debts without investigating their title, *held*, the Bank took the property subject to the charge created by the will. 33 B. 1 = 12 C.W.N. 993 = 8 C.L.J. 345 = 18 M. L.J. 435 = 10 Bom. L.R. 1065 (P.G.) = 5 A.L.J. 661 = 4 M.L.T. 201. A
- (11) Fraud and collusion will invalidate any sale or mortgage by the executor.**
- (a) Fraud and collusion will invalidate any sale or mortgage by the executor. *Whale v. Booth*, 4 T.R. 625 (n); *Rice v. Gordon*, 11 Beav. 265; *Scott v. Tyler*, 2 Dick. 725; *Doe v. Fallows*, 2 Crompt. and Jerv. 481; cited in 1 Will. Exors., 10th Ed., 703-704. B
- (b) Where there is collusion such as to render the transaction invalid, not only a creditor, but a legatee, whether general or specific, is entitled to follow the assets, provided he enforce his right within a reasonable time. *Hill v. Simpson*, 7 Ves. 152; *M'Leod v. Drummond*, 17 Ves. 169; *Wilson v. Moore*, 1 M. and K. 337; cited in 1 Will. Exors., 10th Ed., 706. C

1.—“An executor or administrator has,....power to dispose,....of the property for the time being vested in him under section 4’—(Cld.).

- (c) A purchaser who is acting in collusion for the purpose of defrauding a beneficiary is not protected by this Act. 23 B. 342. D

(12) When creditor might follow the assets into the hands of the purchaser.

- (a) The creditor of the testator might follow his lands into the possession of a purchaser from the heir or devisee, if it could be proved that such purchaser knew :—(i) that there were debts of the testator left unsatisfied, and (ii) that the heir or devisee, to whom he paid his purchase-money, intended to apply it otherwise than in the payment of such debts. 4 C. 897 = 4 C.L.R. 193. E

- (b) But a purchaser, ignorant on either of these points, has a safe title ; for, no duty is cast upon the purchaser from the heir or devisee to enquire whether there are any debts of the testator, or to see to the application of his purchase-money, even where there is an express charge of debts by the testator on the devised estate, at least when the devisee is also executor. 4 C. 897 = 4 C.L.R. 193. F

- (c) Even where there is an express charge of debts, the burden of proof is entirely on the creditor to show that the purchaser from the devisee had notice that the latter intended to misapply the purchase-money. 4 C. 897 = 4 C.L.R. 193. G

- (d) The question, how far lands purchased from a Hindu devisee are liable in the hands of the purchaser for the testator's debts, stands almost on the same footing as a similar question would under the present English Law. 4 C. 897 = 4 C.L.R. 193. H

(13) Lapse of time, how far material.

- (a) Where a mortgage was executed many years after the time fixed in the will for payment of the legacy, and the legacy had not been paid, the lapse of time would be a circumstance to be taken into consideration in determining whether the executors were acting with the consent of the legatees. 33 B. 1 (P.C.). I

- (b) Lapse of time, though a circumstance to be taken into consideration in a suit by an unsatisfied legatee against a purchaser from an executor who is also residuary legatee, will not affect the rights of the parties where the plaintiff was a minor at the date of the alienation and where the continued possession by the residuary legatee was not inconsistent with the purposes of the will. *Ibid.* J

(14) Power of executor or administrator with regard to leases under English Law.

An executor or administrator can assign leases and make under-leases. 1 Will. Exors., 10th Ed., 707. K

(15) Power of executor or administrator to borrow money.

As to this, see notes under S. 89, *supra* and S. 104, *infra*. L

2.—“The power....to dispose of immoveable property....is subject to any restriction....imposed in this behalf by the will.”

(1) Executor's power of disposition is controlled by the testator.

(a) An executor's power of disposition is controlled by the testator. 23 C. 908. **M**

(b) Where a will ran as follows:—“I have certain personal debts. In order to pay off the said debt, the executors shall sell, mortgage or pledge, or demise properties of my estate and they shall pay off the said debt from the proceeds. If the executors desire to sell the immoveable properties, in order to purchase more profitable properties, they shall be competent to do that even;” *held* that these clauses did not imply a limitation on the powers of the executors to mortgage the property of the testator for purchasing other properties and not for paying off his debts. 3 C.W.N. 483. **N**

(c) Where a will contained the clause, “the executor shall pay all my debts . . . ; if there be any difficulty in paying of the debts from the money due to me, he shall either sell the whole or a portion of my estate, or make any other settlement of the estate such as *putni* or *durputni*, etc., and shall pay off my debts from the consideration thus acquired;” *held* that, upon such authority, the executor had no power to mortgage any portion of the testator's estate. 3 C.W.N. 515. **O**

(d) Where a will gave the executor power to sell the testator's property—“to pay off the debts incurred by him or if the property was a losing concern,” *held* there being no prohibition in the will against the executor mortgaging the property, he had power to do so. 8 C.W.N. 362 (364). **P**

(e) The use of such directory expressions in a will as “you are to pay my share of the expenses whatever they may be” does not vest in the executors such an absolute discretion that they may spend the whole and deprive the beneficiary of any beneficial interest in the estate. 30 C. 369=7 C.W.N. 353 (*following*, 1 Knapp. 245); *confirmed on appeal* to the P.C. 33 C. 180. **Q**

(f) Where a will conferred on an executor the power of mortgaging immoveable property in favour of the Official Trustee but the executor mortgaged the property to his co-executors, *held* that the mortgage, not being in accordance with the terms of the will, was invalid. 1 A. 753. **R**

(g) Where a testator by his will gave his widow full powers but directed that during the life of his minor son, she should not have power to transfer without legal necessity and that she should have power to mortgage to pay revenue and other debts, *held*, the will gave her no greater power of alienation than she had under the Hindu Law as a manager on her son's behalf, and that there being no proof of necessity or inquiry, a mortgage created by her was inoperative. 26 C. 707=26 I.A. 97. **S**

(2) Power of disposition of executor is subject to the usual rules of equity.

S. 90 of the Probate Act as amended by S. 14, Act VI of 1889, gives an executor merely the ordinary powers of sale that an owner would have in so far as they are not limited by the will, and as such, those powers are subject to the usual rules of equity. 23 B. 342. **T**

2.—“The power....to dispose of immoveable property....is subject to any restriction....imposed in this behalf by the will” —(Concluded).

- (3) Restriction on alienation in the will of executor who is also residuary legatee are inoperative.

Where the position of a person under a will is not merely that of an executor, but that of a residuary legatee as well, restrictions imposed on him by the will in regard to alienation are invalid, and he may alienate the property, treating the restriction as non-existent or inoperative. 23 C. 446, following 5 C. 438 (P.C.). U

- (4) Executor's power of disposition not controlled by the commencement of an administration action.

The power of disposal of an executor or administrator is not controlled or suspended by the mere commencement of an action by a creditor for administration of the estate. *Neeses v. Burrage*, 41 Q.B. 504, cited in I Will. Exors., 10th Ed., 711. Y

- (5) Executor's power of disposition lost after estate fully administered and property made over to legatees.

As to this, see notes, *supra*.

W

3.—“And the Court which granted the probate permits him.”

- (1) Executor's power of disposition how far dependent upon Court's permission.

(a) S. 90 of the Probate Act, does not make an executor's power to dispose of property of the testator dependent upon the permission of the Court, except where any restriction is imposed by the will. 23 C. 908. X

(b) S. 90 of the Probate Act, does not give the Court power to intervene in the administration of the estate in the hands of the executor, save so far as to judge whether, under the circumstances brought before it, it may deem right that he should have power under the Court's order to act in contravention of a restriction imposed in the will by disposing of any immoveable property specified in the order, in a manner permitted by the order. 23 C. 580 (590). Y

4.—“Previous permission of the Court by which the letters of administration were granted.”

- (1) When application for permission should be made.

Application for leave to sell should be made, not with the petition for grant, but after completion of the grant. 1 C.W.N. lxix. Z

- (2) Who can apply for Courts' permission.

(a) S. 90 of the Probate Act, is not intended to be invoked on the application of persons other than the executor. The permission is to be granted to him to assist him, if he needs such assistance, in carrying out the administration of the estate. 23 C. 580 (590-1). A

(b) But, according to Messrs. Philip and Trevelyan there is nothing in S. 90 of the Probate and Administration Act to prevent an application by any person interested in the disposal of the property for an order under the section. Ph. & Trev. 406. B

4.—“*Previous permission of the Court by which the letters of administration were granted*”—(Concluded).

- (3) Permission to dispose of the property can be granted only for purpose of administration.

(a) An application for leave to mortgage the property of the deceased by the administrator, can be granted only for the purpose of administration, and not after the estate has been fully administered. 3 C.W.N. 635.C

(b) So, after the administration is at an end, a widow who had obtained letters of administration ceases to be administratrix and remains in possession of the properties not as administratrix, but as widow and heiress. She can sell or mortgage the properties without the leave of the Court, for purposes for which a widow can sell or mortgage. 3 C.W.N. 635.D

- (4) A compromise by an executor or administrator in excess of his powers under S. 90 is not lawful.

Where a person acting for himself and also as administrator of the estate of a deceased person compromised a suit agreeing thereby to execute within a month a *durputni* lease of property jointly belonging to himself and the estate of the deceased, and undertook previously to doing that to obtain the permission of the Court which had granted the letters of administration, but such permission was refused on the ground of the proposed lease not being beneficial to the estate, *held* that the administrator had acted in excess of the powers under S. 90 in entering into the compromise, which was therefore not a lawful compromise within the meaning of S. 375, C.P.C., 1882. 14 C.W.N. 451=11 C.L.J. 346=5 Ind. Cas. 236. E

- (5) Order granting permission is appealable.

An order of a District Judge granting permission to the executor or administrator for the disposal of immoveable property under S. 90 of the Probate Act, is appealable. 28 C. 149=5 C.W.N. 443. F

5.—“*A disposal of property by an executor or administrator in contravention of sub-section (2) or sub-section (3),...is voidable.*”

Disposition without Courts' permission—Effect.

(a) A mortgage by some executors without the permission of the Court is good as between them and the mortgagees. It is voidable at the instance of other persons interested, but they can avoid it on principles of equity, only on making good what the estate has benefited by the mortgage. 3 C.L.J. 260 (268). G

(b) But a mortgage executed without the Judge's permission, by a person to whom probate was granted by mistake, is bad. 6 C.W.N. 787. H

(c) Under S. 90 of the Probate and Administration Act, a lease by an administrator for more than five years is not void, but only voidable at the instance of any person interested in the property. As between the lessor and the lessee, it is good. 3 C.W.N. 54. I

6.—“Any other person interested in the property.”

“Person interested in the property,” meaning.

- (a) The words “person interested in the property” mean a person interested independently of the executor whose alienation is sought to be avoided. 23 C. 446. J
- (b) So, a person deriving his interest as creditor of an executor in his personal capacity and not as creditor of the estate of the testator, was held not entitled to avoid an alienation by the executor under S. 90, cl. (4), even if it is invalid. (*Ibid.*) K

Miscellaneous.

(1) Power of Hindu executor to transfer estate to the Administrator-General.

As to this, see 22 C. 788=22 I.A. 107, cited under S. 12, *supra*, and see, also, S. 31 of Act II of 1874. L

(2) Power of Administrator-General to whom an estate has been transferred by the executor.

A transfer of the interest of the executors of a will in the estate of the testator, by them, to the Administrator-General, under S. 31, Act II of 1874, confers on the latter only such powers of disposition as the executors themselves possessed. 23 C. 908. M

(3) Power of disposition of a person obtaining a limited grant under S. 37.

As to this, see notes under S. 37, *supra*. N

(4) Consent of beneficiaries to a particular disposition, how far valid.

When all the parties beneficially interested under a will consent, they can agree to dispose of the estate in a particular manner when it reaches their hands, for, in such a case they are dealing with their own property. 9 C.L.J. 19=1 Ind. Cas. 573. O

(5) Giving a promissory note is not a “disposal” of property under the section.

Although an administrator can, under the section dispose of the property of the deceased, either wholly or in part, in such manner as he may think fit, the estate of the deceased cannot be held liable for an unsecured debt incurred under a promissory note by the administrator, for, it cannot be said to amount to a disposal of any portion of the property of the deceased testator. 12 O.C. 414. P

(6) Alienation by a person having several estates and interests in the land—What it conveys.

- (a) Where a person having several estates and interests, conveys all his estates and interests in the land, every estate or interest which may be vested in him would pass by the conveyance although such estate or interest did not vest in him in the character in which he professed to convey the land. 14 B.L.R. o.c. 21; 19 C. 26; 27 B. 108. Q
- (b) Thus, a sale of Government securities by an administrator who is also an heir to the deceased confers a valid title on the purchaser, whether the vendor was described as administrator in the sale-deed or not, and whether the vendor administered the purchase-money as part of the assets or not. 19 C. 26, referring to Murch's case, 23 Ch. D. 188; *Corzér v. Cartwright*,⁵⁷ H.L. 781. R

Miscellaneous—(Continued).

- (7) **Position of Hindu executor before the Hindu Wills Act—Inferior to an English Executor—Only a manager with no estate vested in him.**

As to this, see notes under S. 4, *supra*.

S

- (8) **Power of Hindu executor before the Hindu Wills Act.**

(a) An executor of a Hindu Will not governed by the Hindu Wills Act had, prior to the passing of the Probate and Administration Act, V of 1881, only the powers conferred upon him by the will, with such additional powers as might be necessary for the management of the property. And a disposal of property by such executor would be valid only if within those powers. Ph. & Trev. 405; see 2 B.L.R. o.c. 1; Bourke, pt. VII, 48; 8 B.H.C.R. 150; 15 B.L.R. o.c. 7.

T

(b) In the case of Hindu wills executed before the Hindu Wills Act came into force, where the binding character of an alienation by the executor is in question, the burden of proving, *prima facie* the necessity thereof, will lie on the alienee. 25 C. 103; referring to 6 M.I.A. 399.

U

- (9) **Power of the Manager of an infant heir to charge an estate not his own under the Hindu Law.**

As to this, see 6 M.I.A. 393 (423).—Hanooman Persaud's case.

Y

- (10) **Power of executor or administrator to compromise.**

(a) Under S. 21 of the English Trustee Act, 1893, executors and administrators have power to compromise and release debts and also claims by persons claiming as beneficiaries.

(b) An executor, can, in a proper case, compromise the claim of a co-executor. *Hawley v. Blake*, 1904, 1 Ch. 622.

W

- (11) **Executor can sue for construction of the will.**

An executor is competent to institute a suit for the construction of the will of his testator. See 12 B. 185; 18 B. 1.

X

- (12) **Effect on mesne acts of executor or administrator of grant void or voidable.**

As to this, see notes under S. 84, *supra*.

Y

- (13) **Acts done under a forged Will are void.**

Where a will is declared to be a forgery and therefore void *ab initio*, any acts done by a person under any title created by that will, must be held to be void in law. 6 C.W.N. 787.

Z

- (14) **Acts done under a void grant are void.**

Where administration was granted on concealment of a will which appointed executors, the grant was void from its commencement, and the acts performed by the administrator in that character were equally void. *Per Mitra, J.*, in 3 C.L.J. 442 (445)=10 C.W.N. 673=33 C. 713.

A

- (15) **Court competent to set aside fraudulent deeds of testator in administration suit.**

Where the primary object of a suit is the administration of the estate of a deceased person resident within the ordinary original jurisdiction of the Calcutta High Court, the principal executor being also resident there, and the actual administration going on there, the High Court of Calcutta, in its ordinary jurisdiction, has a right to order administration of the estate, and as ancillary to such order, to set aside deeds obtained by fraud of the executor. 33 C. 180=32 I. A. 193=9 C.W.N. 961=2 C.L.J. 189=7 Bom. L.R. 887=15 M.L.J. 381.

B

Miscellaneous—(Concluded).

(16) How far executor's possession can be adverse to the heir-at-law.

Where an executor takes possession of his testator's property under a will containing a void residuary devise, his possession may, from the very commencement, be adverse to the heir-at-law who claims the residue as on an intestacy. 2 C.L.R. 112. **C**

(17) Suit by heir for recovery of undisposed of residue is liable to be barred by limitation.

Where some of the trusts created by a testator fail or turn out to be invalid, suits by the testator's heirs for the recovery of the undisposed of property are liable to be barred by limitation, though they might still sue for the proper administration of the valid trusts against the trustees under the will. 8 C. 788=11 C.L.R. 370. **D**

(18) Conversion of property forming the subject of devise does not change its character.

When property is devised to a married woman, so as to be absolutely for her sole use and benefit, and free from the control, debts and liabilities, of her husband, its conversion into any other form of property does not change its character and conditions, even though such conversion may be made in anticipation of the legacy. 1 A. 762 (772). **E**

(19) Executor, how far a trustee for a specific purpose within S. 10 of the Limitation Act.

As to this, see notes under S. 4, *supra*. **F**

(20) How far an executor is entitled to remuneration.

As to this, see notes under S. 6, *supra*. **G**

(21) Executor has no right to the undisposed of residue.

As to this, see notes under S. 4, *supra*. **H**

(22) Power to adopt given to an executor is bad.

A power to adopt given to a wife and to the executor conjointly is bad as to the executor. 27 C. 996=27 I.A. 128=4 C.W.N. 549. **I**

Cases under S. 269 of the Succession Act.

(1) No necessity for leave to dispose of property in a grant under the Succession Act.

(a) The Succession Act does not give the Court jurisdiction, when granting probate or letters of administration under its provisions, to include in such grant authority to dispose of property in respect of which the grant is made, such power of disposal being expressly given by S. 269. 23 C. 579. **J**

(b) So, in an application for letters of administration *de bonis non*, it is not necessary to ask for leave to dispose of the property concerned. 23 C. 579. **K**

(2) S. 269 of the Succession Act does not supersede S. 39 of the Transfer of Property Act.

(a) S. 269 does not in any way supersede S. 39 of the Transfer of Property Act, IV of 1882. 23 B. 342 (348). **L**

(b) So, where an executor given a limited power of sale by the will, sold the immoveable property belonging to the estate with the object of defeating the claim of the testator's widow for maintenance and the purchaser was also aware of the fraud, *held*, the widow was entitled to recover her maintenance out of the property in the hands of the purchaser. 23 B. 342. **M**

[S. 270.]

91. If an executor or administrator purchases, either directly or indirectly, any part of the property of the deceased, the sale is voidable at the instance of any other person interested in the property sold.

Purchase by executor or administrator of deceased's property 1.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 270 of the Indian Succession Act, X of 1865. N

I.—“Purchase by executor or administrator of deceased's property.”**(1) Principle of the section, explained.**

One of the most firmly established rule is that persons dealing as trustees and executors must put their own interest entirely out of the question and this is so difficult a thing to do in a transaction in which they are dealing with themselves that the Court will not inquire whether it has been done or not, but at once say that such a transaction cannot stand. *Per Lord Eldon in Cook v. Collingbridge*, Jac. 607. O

(2) An Executor cannot himself purchase the assets.

(a) An executor cannot be allowed, either immediately or by means of a trustee, to be the purchaser from himself of any part of the assets, but shall be considered as a trustee for the persons interested in the estate, and shall account for the utmost extend of advantage made by him of the subject so purchased. *Hall v. Hallet*, 1 Cox. 134; *Watson v. Toone*, 6 Madd. 153, cited in 1 Will. Exors. 10 Ed., 706. P

(b) An executor, cannot, as a general rule, be allowed either immediately or by means of a trustee to be a purchaser from himself of any part of the assets. Such a purchase is treated as a breach of trust without inquiry whether the transaction was beneficial or not. But, where an executor purchases from a legatee, such a purchase may be a perfectly justifiable one, though, if challenged in proper time, a Court of Equity will inquire into it, ascertain the value that was paid by the trustee, and throw upon him the onus of proving that he gave full value and that all information was laid before the *cestui que trust* when the property was sold. 13 C.W.N. 557=9 C.L.J. 383=1 Ind. Cas. 289. Q

(3) Executor should not use his position as such to become purchaser.

(a) A sale is not avoided merely because, when entered upon, the purchaser, may at his option become trustee for the property purchased, e.g., by proving a will under which he was named executor, if in point of fact he never does become such. To avoid such sale, it must be shown that the purchaser in fact used his power in such a way as to render it inequitable that the sale should be upheld. *Clark v. Olark*, 9 App. Case 733, cited in 1 Will. Exors., 10th Ed., 707. R

(b) A sale is not to be avoided merely because, when entered upon, the purchaser had the power to become the trustee of the property purchased. It is immaterial whether the purchaser subsequently does in fact become the trustee or not. The true test to be applied in such cases is, has the purchaser used his position in such a way as to render it inequitable that the sale should be upheld. 13 C.W.N. 557 (569). S

1.—“Purchase by executor or administrator of deceased's property”
—(Concluded).

(4) Executor cannot buy up debts or legacies at under-value.

An executor cannot buy for his own benefit debts due to estate or legacies at less than their full value. *Anon. Salk 155, Ex parte James, 8 Ves. 346, cited in Hend. 3rd Ed., 335.* **T**

(5) Executor cannot sell for purpose of re-sale to himself.

A sale by an executor for purpose of a re-sale to himself is bad. *Cook v. Collingridge*, Jac. 607. **U**

(6) Purchase at execution sale of legatee's interest is not prohibited by the section.

The purchase at an execution sale of a legatee's interest by the administratrix *durante minoritate* was upheld as not made in contravention of S. 91 of the Probate Act. 13 C.W.N. 557. **V**

92. When there are several executors or administrators, the [S. 271.]

Powers of several executors or administrators exercisable by one 1.

powers of all may, in the absence of any direction to the contrary in the will or grant of letters of administration, be exercised by any one of them who has proved the will or taken out administration.

Illustrations.

- (a) One of several executors has power to release a debt due to the deceased.
- (b) One has power to surrender a lease.
- (c) One has power to sell the property of the deceased, moveable or immoveable.
- (d) One has power to assent to a legacy.
- (e) One has power to endorse a promissory note payable to the deceased.

(f) The will appoints A, B, C and D to be executors, and directs that two of them shall be a quorum. No act can be done by a single executor.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 271 of the Indian Succession Act, X of 1865. **W**

1.—“Powers of several executors or administrators exercisable by one.”

(1) Scope of the section.

(a) The effect of this section, so far as it relates to executors, is that where several executors obtain probate and the will directs them all to act together, none of them can act singly; but the section is not intended to disqualify, by reason of any such direction in the will, one of several executors who alone has obtained probate, the others having either renounced or refused to accept office. For, it is only the executors who have obtained probate that can act as representatives of the testator; an executor who renounces or refuses, or is unable to act, should be regarded as if he had never been appointed. 27 C. 683 (688). **X**

1.—“Powers of several executors or administrators exercisable by one”—(Continued).

- (b) So, where several executors were jointly empowered by the will to alienate any property for payment of debts and to borrow money for the improvement and preservation of the estate, and one of them who alone had obtained probate renewed *hatchittas* originally executed by the testator, in a suit upon these *hatchittas* against the heirs of the testator, *held* that the debt was binding on the estate. 27 C. 683. **Y**

(2) Grant of probate to several executors.

As to this, see S. 9, *supra*.

Z

(3) Each of several executors or administrators has the whole estate.

If there be several executors or administrators, they are regarded in the light of an individual person. And the acts of one of them, in respect of the administration of the effects, are deemed to be the acts of all. For they have a joint and entire interest in the effects of the testator or intestate; and in case of death, such interest vests in the survivor, without a new grant by the Court. 1 Will. Exors., 10th Ed., 684, 715. **A**

(4) One of several administrators stands on the same ground with one of several executors.

One of several administrators stands on the same ground with one of several executors. *Jacomb v. Harwood*, 2 Ves. Sen. 267, cited in 1 Will. Exors., 10 Ed., 720. **B**

(5) What acts of one are binding on the others.

- (i) A release of a debt by one is valid and binds the rest. *Jacomb v. Harwood*, 2 Ves. Sen. 268, cited in 1 Will. Exors., 10th Ed., 715. See Illus. (a).
- (ii) A settlement of an account by one executor, is binding on the others, in the absence of fraud. *Smith v. Everett*, 27 Beav. 446, cited in *Ibid.* 716.
- (iii) A grant or a surrender of a term by one is binding on the rest. *Simpson v. Gutteridge*, 1 Madd. 616, cited in *Ibid.* See Illus. (b).
- (iv) An acknowledgment of a debt by one of several executors as such binds the estate. *Re Macdonald*, 1897, 2 Ch. 181, cited in *Ibid.* 717.
- (v) One executor may assent to a legacy, even where the legacy is to himself, 1 Will. Exors., 10th Ed., 718, citing *Godolphin*; *Townson v. Tickell*, 3 B. and A. 31, 40; *Cole v. Miles*, 10 Hare 179. See Illus. (d).
- (vi) A receipt by one is a good discharge though the signatures of the co-executors turns out to be forged. *Charlton v. Durham*, 4 Ch. 433.
- (vii) The indorsement of a bill of exchange by one of several executors is probably sufficient to transfer the property in the bill. *Chalmers on Bills*, 6th Ed., 129. See Illus. (e).
- (viii) The act of one executor in possessing himself of the effects, is the act of the others, so as to entitle them to a joint estate in possession, and a joint right of action, if they are afterwards taken away. 1 Will. Exors., 10th Ed., 685. **C**

(6) What acts of one are *not* binding on the others.

- (i) One of several executors cannot bind the others by his several contracts. *Turner v. Hardey*, 9 M. and W. 770, cited in 1 Will. Exors., 10th Ed., 719. **D**

1.—“Powers of several executors or administrators exercisable by one”—(Continued).

- (ii) It is doubtful whether one executor may pay a statute-barred debt, in spite of the dissent of his co-executor. *I Will. Exors.*, 10th Ed., 718. **E**
- (iii) It is doubtful whether one executor can give a valid acknowledgment of a statute-barred debt in spite of the dissent of his co-executor. *I Will. Exors.*, 10th Ed., 718. **F**

(7) All must join in bringing actions.

- (a) All executors must join in bringing actions, even though some are infants. *Smith v. Smith*, *Yelv.* 130, *cited in I Will. Exors.*, 10th Ed., 725. **G**
- (b) But an executor who alone has proved the will can sue without making the others parties. *I Will. Exors.*, 10th Ed., 726. **H**
- (c) See *C.P.C.*, 1908. O. 31, r. 2. **I**

(8) How far an executor can sue or be sued by his co-executors.

- (a) As a general rule, one executor cannot sue or be sued by his co-executors. *I Will. Exors.*, 10th Ed., 726. **J**
- (b) But, if a debtor makes his creditor and another his executors, and the creditor neither proves the will nor acts as executor, he may bring an action against the other executor. *Dorchester v. Webb*, *W. Jones*, 345, *cited in Ibid.* **K**
- (c) Where there are several executors, they may agree that one of them shall hold the land devised to them in trust at a fixed rent, and if the rent falls into arrear, he may be distrained upon in respect of it. *Cowper v. Fletcher*, 84 *L.J.N.S.Q.B.* 187, *cited in I Will. Exors.*, 10th Ed., 727. **L**

(9) One of several executors cannot continue a suit without probate.

Where A, one of three executors of a Mahomedan will, none of whom had taken out probate, desired to carry on a suit originally instituted by their testator to recover a share of an estate, *held* that under S. 92 of the Probate Act being only one of three executors, A could not carry on the suit without first obtaining probate of the will. 8 B. 241 (255-256). **M**

(10) One of several executors who alone had acted is a proper defendant in an administration suit.

Where, of three executors, only one had acted and got possession of the estate, a suit by the testator's widow for administration of the estate was held to be well constituted for the purpose of a motion for a receiver, although only the executor who had acted was made defendant, the other two executors not being parties to the suit. 19 B. 83. **N**

(11) Executor who has not proved can call for an inventory and account from those who have proved.

An executor who has not proved, and to whom leave has been reserved to prove the will, can call for an inventory and account from his co-executors who have proved and are managing the estate. 27 B. 281. **O**

(12) A notice given to one executor is notice to all.

A notice of resumption of land is valid and sufficient if given to one of three executors who are joint occupants of the land. 30 B. 137. **P**

1.—“Powers of several executors or administrators exercisable by one”—(Concluded).

- (13)
- Illustration (f), is an example of contrary direction.**

Illus. (f) is an example of a direction to the contrary. Stokes' Indian Succession Act. Q

- (14)
- Illus. (f), criticised.**

Taking S. 92 and its Illus. (f) together, no one will now be safe in dealing with a single executor unless he sees the probate and ascertains either that no other executors were appointed by the testator, or that the will contains no such direction as that mentioned in the illustration. Stokes' Indian Succession Act. R

[S. 272.]

- 93. Upon the death of one or more of several executors or administrators, all the powers of the office become, in the absence of any direction to the contrary in the will or grant of letters of administration, vested in the survivors or survivor.**

Survival of powers on death of one of several executors or administrators 1.

(Notes).**General.**

- (1)
- Corresponding Indian Law.**

This section corresponds to S. 272 of the Indian Succession Act, X of 1865, but contains in addition the words “in the absence of any direction to the contrary in the will or grant of letters of administration.” S

- (2)
- Section in accordance with English Law.**

This section is in accordance with the English cases of *Flanders v. Clarke*, 1 Ves, Sen. 9; and *Hudson v. Hudson*, Cas. temp. Talb. 127; Hend, 3rd Ed., 337. T

1.—“Survival of powers on death of one of several executors or administrators.”

- (1)
- Grant of probate to several executors.**

As to this, see S. 9, *supra*. U

- (2)
- Accrual of representation to surviving executor.**

As to this, see notes under S. 11, *supra*. V

- (3)
- Right to perform religious ceremonies devolves on survivors.**

The right to perform certain religious ceremonies conferred by the will exclusively on the executors, passes on the death of one of them to the remaining executors, and is not transmitted to the heir of the deceased executor. 13 C.W.N. 557=9 C.L.J. 383=1 Ind. Cas. 289. W

[S. 273.]

Powers of administrator of effects unadministered 1.

- 94. The administrator of effects unadministered has, with respect to such effects, the same powers as the original executor or administrator.**

(Notes).**General.****Corresponding Indian Law.**

This section corresponds to S. 273 of the Indian Succession Act, X of 1865. X

1.—“Powers of administrator of effects unadministered.”

(1) “Effects,” meaning.

The word “effects” in this section is synonymous with “property ;” and like all other words of similar import it is always liable to be controlled by the rule of *esjudem generis*. *Rawlings v. Jennings*, 13 Ves. 39 (46), cited in Majumdar, 623. **Y**

(2) Rules as to grant of effects unadministered.

As to this, see Ss. 45 and 46, *supra*. **Z**

(3) Estate of an administrator *de bonis non*.

An administrator *de bonis non* is entitled to all the goods and personal estate which remain in *specie*, and were not administered by the first executor or administrator. *Per Lord Holt in Wankford v. Wankford* 1 Salk. 306, cited in 1 Will. Exors., 10th Ed., 687. **A**

(4) Power of administrator *de bonis non*.

By the grant of administration *de bonis non*, the administrator becomes the only personal representative of the original deceased ; and with respect to the estate left unadministered by the former executor or administrator, he has the same power and authority as the original representative ; for he succeeds to all the legal rights which belonged to the former executor or administrator in his representative character. 1 Will. Exors., 10th Ed., 731. **B**

(5) Assets fraudulently alienated will be considered as unadministered.

If the original executor or administrator has fraudulently alienated the assets for his own use in *collusion with the vendee*, such assets will be considered, in equity, as unadministered, and will consequently pass as such to the administrator *de bonis non* ; who, in that character, may apply to the Court to have the sale set aside, and the property conveyed to him. 1 Will. Exors., 10th Ed., 689, citing *Cubbridge v. Boatwright*, 1 Russ. Chan. Cas. 549. **C**

Powers of administrator during minority 1.

95. An administrator during minority has [S. 274.] all the powers of an ordinary administrator.

(Notes).

General.

Cosponding Indian Law.

This section corresponds to S. 274 of the Indian Succession Act, X of 1865. **D**

1.—“Powers of administrator during minority.”

(1) Rules as to grant of administration during minority.

As to this, see Ss. 31 and 32, *supra*. **E**

(2) Power of administrator during minority.

An administrator during minority has the same power of selling personal property as an executor. *In re Cope*, 16 Ch. D. 49 ; *In re Thompson and M'Williams*, 1896, 1 Ir. 356, cited in Theob, 6th Ed., 436. **F**

Powers of married executrix or administratrix 1.

96. When probate or letters of administration shall have been granted to a married woman, she has all the powers of an ordinary executor or administrator. [S. 275.]

(Notes).
General.

Corresponding Indian Law.

This section corresponds to S. 275 of the Indian Succession Act, X of 1865. G

1.—“*Powers of married executrix or administratrix.*”

- (1) **Consent of husband necessary for a grant to the wife under the Succession Act, but not under this Act.**

Under the Succession Act, though not under the Probate and Administration Act or under the English Law, consent of husband is necessary for a grant of probate or letters of administration to a married woman. See Ss. 183 and 189 of the Succession Act, X of 1865. H

- (2) **Husband of executrix or administratrix not a necessary party to suit by or against her.**

As to this, see C.P.C., (1908), O. 31, r. 3. I

CHAPTER VII.

OF THE DUTIES OF AN EXECUTOR OR ADMINISTRATOR.

[S. 276].

97. It is the duty of an executor to provide funds for the performance of the necessary funeral ceremonies of the deceased ¹ in a manner suitable to his condition, if he has left property sufficient for the purpose.

As to deceased's funeral ceremonies.

(Notes).
General.

- (1) **Corresponding Indian Law.**

This section corresponds to S. 276 of the Indian Succession Act, X of 1885, but with the words “to provide funds for the performance of the necessary funeral ceremonies of the deceased” used in place of the words “to perform the funeral of the deceased” of the latter section. J

- (2) **Difference between this Section and S. 276 of the Succession Act.**

While under S. 276 of the Succession Act, the duty of the executor is to *perform* the funeral ceremonies, under S. 97 of the Probate and Administration Act, his duty is only to *provide funds for the performance* of the same. The reason for this difference, according to Majumdar, is that the funeral ceremonies of the majority of persons for whom the Probate Act is intended, that is, the Hindus, are required to be performed under their *Sastras* by persons who may not be appointed executors. Majumdar, 625. K

1.—“*It is the duty of an executor to provide funds for the... necessary funeral ceremonies of the deceased.*”

- (1) **Executor bound to give effect to directions of the deceased as to burial.**

The directions of the deceased as to burial should be given effect to; without such directions, the body should not be cremated in England. I Will. Exors., 10th Ed., 737. L

- (2) **Executor with assets is personally liable for funeral expenses.**

(a) The executor, if he has received assets, is personally liable for the proper funeral expenses of the testator, though he may not have ordered the funeral or expressly contracted to pay for them. *Tugwell v. Heyman*, 3 Campb. 298; *Rogers v. Price*, 3 Younge and Jerv., 28; *Sharp v. Lush*, 10 Ch. D. 468 (472). M

1.—“It is the duty of an executor to provide funds for the....necessary funeral ceremonies of the deceased”—(Concluded).

(b) Where the executors first gave orders for a third-class funeral for the deceased, but by their conduct induced the plaintiff to furnish a second-class funeral, *held*, they were liable to pay for it *whether they had assets or not*. 6 W.R. Civ. Ref. 27. N

(3) Stranger providing for the funeral in case of necessity is entitled to recover from the estate.

In case of necessity, a stranger may order the funeral and pay for it out of the assets, without rendering himself liable as executor *de son tort*, and he may recover the expenses from the estate. Vin. Abr. Executor, B.A. 24; *Green v. Salmon*, 8 A. and E. 348, cited in Theob., 6th Ed., 768. O

N.B.—See also notes under S. 101, *infra*.

98. (1) An executor or administrator shall within six months [S. 277.]
Inventory and account i. from the grant of probate or letters of administration, or within such further time as the Court which granted the probate or letters may from time to time appoint, exhibit in that Court an inventory containing a full and true estimate of all the property in possession, and all the credits, and also all the debts owing by any person to which the executor or administrator is entitled in that character,

and shall in like manner, within one year from the grant or within such further time as the said Court may from time to time appoint, exhibit an account of the estate, showing the assets which have come to his hands and the manner in which they have been applied or disposed of.

(2) The High Court may from time to time prescribe the form in which an inventory or account under this section is to be exhibited.

(3) If an executor or administrator, on being required by the Court to exhibit an inventory or account under this section, intentionally omits to comply with the requisition, he shall be deemed to have committed an offence under section 176 of the Indian Penal Code.

(4) The exhibition of an intentionally false inventory or account under this section shall be deemed to be an offence under section 193 of that Code.

(Old Acts).

Act VI of 1889 :—S. 15 of this Act substituted to present Section 98 in place of the old Section which ran as follows :—

"An executor or administrator, shall within six months from the grant of probate or letters of administration, exhibit in the Court by which the same has or have been granted an inventory containing a full and true estimate of all the property in possession, and all the credits and also all the debts owing by any person or persons to which the executor or administrator is entitled in that character, and shall, in like manner, within one year from the date aforesaid, exhibit an account of the estate, showing the assets that have come to his hands, and the manner in which they have been applied or disposed of."

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 277 of the Indian Succession Act, X of 1865. P

1.—"Inventory and account."

(1) Construction of the section.

The submission of inventory and account under S. 98 may be enforced either under the general rule laid down in the section, or under the special rule in cl. (3). The special rule is intended to be applied in those cases wherein the general rule is not complied with; so, the Court is not at liberty to require an executor or administrator to exhibit inventory and account under cl. (3) at any time before at least six months or twelve months have expired from the date of the grant. Cl. (4) governs the exhibition of inventory and account under both the rules. Majumdar, Supplement, 45. Q

(2) Scope of Judge's duties under this section.

All that the District Judge has to do under this section is to see that the inventory and account *prima facie* satisfy the requirements of the section, *i.e.*, that the inventory appears on inspection to be a free and true estimate of all the property, credits and debts, and that the account in inspection appears really to be a true one showing the assets and their disposal; to ascertain this, the inventory and account should be passed under some examination by the Judge's staff so as to detect manifest mistakes or omissions. If such were discovered, the papers would not satisfy the section, and for this purpose the section empowers the Judge to extend the time to the executor or administrator to amend the account. 31 C. 628=8 C.W.N. 578. R

(3) What the inventory under this section should include.

Unlike in England, under S. 98, the inventory is intended to include not only all that the deceased died possessed of, but also the subsequent profits of his business, and the rents of his immoveables. See *Pitt v. Woodham*, 1 Hagg 250, cited in Stokes, 175. S

(4) Value set forth in the inventory is not conclusive.

Value of the property set forth in the inventory, though *prima facie* evidence of the real value, is not conclusive evidence of the same. 4 W.R.P.C. 106. T

I.—“Inventory and account”—(Continued).

(5) Nor the value in the will.

Nor is the statement in a will as to the value of the testator's property any evidence thereof. 1 B.H.C.R. 561. U

(6) An executor, as any other trustee, must be constantly ready with his accounts.

It is the first duty of an accounting party, whether an agent, a trustee, a receiver, or an executor—for, in this respect they all stand in the same position—to be constantly ready with his accounts. *Per Plumer M.R. in Pearse v. Green*, 1 Jac. and W. 140. Y

(7) One account and not a series of accounts is required.

(a) The provisions of this section mean that one account is to be exhibited, and not a series of accounts from time to time. Ph. and Trev. 410; 25 C. 250=1 C.W.N. 646. W

(b) Under this section, the Court cannot go on from time to time directing executors to deliver accounts. The power given under this section can be exercised only once. 25 C. 250=1 C.W.N. 646. X

(8) Judge cannot call for an annual account.

(a) The fact that the testator enjoined on his executor to prepare accounts annually does not enlarge the Judge's power and empower him to exact an account annually, although it would authorise a person interested to take action against the executor. 31 C. 628=8 C.W.N. 578. Y

(b) When once an account has been fulfilled and accepted shortly after the expiry of a year from the grant of probate, the Judge has no power to call for further accounts of subsequent years. 31 C. 628=8 C.W.N. 578. Z

(9) Nor for a revised account.

The section does not give a Judge power to call for a revised account, if an account has already been exhibited as required by the section and has been accepted as *prima facie* true; but if it appears that the account is materially untrue, the Judge may take action under Sub-S. (4) of the section. 31 C. 628=8 C.W.N. 578. A

(10) Judge cannot institute an enquiry by audit of inventory and account at the expense of the executor or administrator.

Under this section, the District Judge has no power to institute a judicial inquiry by an audit of the inventory and account at the expense of the executor or administrator; nor can such an authority be implied from the provisions of the C.P.C., as to the appointment of a Commissioner to examine accounts. 31 C. 628=8 C.W.N. 578. B

(11) Judge not to act *suo motu* under the section.

The Court of Judicial Commissioner, Sind, as a Court of Probate, should not ordinarily act *suo motu* under S. 277 of the Succession Act (corresponding to S. 98 of the Probate and Administration Act), and cite an executor or administrator to account for the property that has come into his possession in pursuance of the authority granted to him. 3 S.L.R. 197=4 Ind. Cas. 1163. C

1.—“Inventory and account”—(Continued).

(12) “From time to time appoint”—Meaning.

(a) The words “from time to time appoint” in the first para of cl. (1) of this section relate to an extension of the period within which the inventory is to be exhibited. They cannot mean that the Court can go on again and again calling on executors to furnish an inventory. 25 C. 250=1 C.W.N. 646. D

(b) The words “from time to time appoint” in the second para of cl. (1) of this section relate to an extension of time for putting in the account and do not authorise the Court to go on calling upon the executors to exhibit accounts from time to time, as often as the Court thinks fit. 25 C. 250=1 C.W.N. 646. E

(13) Sanction for prosecution under S. 176, I.P.C., should not be made to depend on examination of the accounts filed.

Where an executor did not file any accounts while he continued as executor, and after the probate was revoked, the Judge called upon him to produce his accounts within a certain time and upon his failure, sanctioned his prosecution under S. 176, I.P.C., and kept the sanction in abeyance on his filing the accounts, but restored it subsequently, when the Judge, on examining the accounts suspected their genuineness, held that the sanction was not good in law, and that the Judge was not right in making the order depend on the examination of the accounts themselves. 2 C.W.N. 597. F

(14) What enquiry necessary before sanctioning prosecution under the Penal Code.

Under this section the Judge cannot make an order sanctioning a prosecution under the Penal Code without an enquiry whether the omission to produce the accounts was intentional or the accounts filed were intentionally false. 2 C.W.N. 597. G

(15) S. 176, I.P.C., scope.

S. 176, I.P.C., Act XLV of 1860, deals with omission to give notice or information to a public servant by a person legally bound to give notice or information. H

(16) S. 193, I.P.C., scope.

S. 193, I.P.C., Act XLV of 1860, deals with intentionally giving or fabricating false evidence. I

(17) Petition must state amount of assets likely to come into petitioner's hands.

The amount of assets likely to come into the petitioners's hands must be stated in the petition for probate or letters of administration. See Ss. 62 and 64, *supra*. J

(18) Practice of Calcutta High Court where executor or administrator neglects to file inventory or account.

According to the practice of the Calcutta High Court, where executors or administrators neglect to file inventories or accounts for two months beyond the time allowed them by law, the Registrar is ordered to issue the necessary citations and other process to compel the filing of the same and to charge the parties making default with costs of the same. Belchamber's Rules, 752. K

1.—“*Inventory and account*”—(Continued).

- (19) Practice of the Madras High Court where executor or administrator wants further time to file inventory or account or any person wants to inspect it.

According to the practice of the Madras High Court an application by an executor or administrator for further time to file an inventory or account, or by a person interested in the estate of the deceased, for leave to inspect the same, or that the executor or administrator may be directed to file the same, shall be made by summons in chambers, entitled in the petition in which the grant of probate or letters of administration was made, and shall be supported by affidavit stating the cause of the delay in filing the same, or the interest of the applicant as the case may be. Original Side Rules, No. 468. L

- (20) “Assets,” meaning.

As to this, see notes under S. 62, *supra*. M

- (21) High Court, definition.

As to this, see notes under S. 52, *supra*. N

- (22) When omission to exhibit inventory or account or exhibition of untrue one is “just cause” for revocation.

As to this, see S. 50, Expl. cl. (5), and notes thereto, *supra*. O

- (23) Failure to exhibit inventory or account though not mere delay is a breach of the administration bond.

As to this, see notes under S. 79, *supra*. P

- (24) Executors who have not proved may call for an inventory and account from those who have proved.

As to this, see 27 B. 281, cited under S. 9, *supra*. Q

- (25) Limitation for a suit for account by *cestui que trust*.

A suit by a *cestui que trust* for an account of the defendant's stewardship, and to be paid any balance which may be found due to him on taking the account is governed not by S. 10 of the Limitation Act, but by Art. 120. 5 C. 910=6 C.L.R. 195. See, also, 10 B. 242 (247). R

- (26) In an administration action, the Court can charge executor with property in his possession unaccounted for.

In an administration action, it is competent to the Court, in taking accounts, to charge the executor with the value of certain property shown to have been possessed by the executor and not forthcoming and accounted for. 4 W.R.P.C. 106. S

- (27) Meaning of “property” under S. 234, C.P.C., 1882.

Under S. 234, C.P.C., 1882, “property” is not identical with “assets,” so as to include mere rights of action. 11 B. 727. T

- (28) For what a legal representative of a deceased judgment-debtor is liable under S. 234, C.P.C., 1882.

Under S. 234, C.P.C., 1882, a legal representative of a deceased judgment-debtor, who has failed purposely or negligently to recover some debt due to the estate of the deceased or some property belonging to it, is not liable in the same way as for “property of the deceased which

1.—“Inventory and account”—(Continued).

has come to his hands.” In an execution proceeding, he is liable only in respect of property actually received by him. In other cases he can be made liable only under a suit for administration or other regular action. 11 B. 727. U

English Law on the subject of inventory.

(1) When an executor or administrator exhibits an inventory.

In England, according to the modern practice, neither the executor nor the administrator exhibits any inventory whatsoever, unless cited for that purpose by a party having an interest or even the *appearance* of an interest. 1 Will. Exors., 10th Ed., 742, 743; citing *Phillips v. Bignell*, 1 Phil. 241. Y

(2) Who can call for an inventory.

(a) In England, any person interested in the estate, *e.g.*, a next-of-kin, as being entitled in distribution, or a legatee or a creditor, may call upon the administrator or executor who has become the legal personal representative of the deceased, to exhibit an inventory of the estate and render an account of his administration thereof. *Triest. and Coote*, 13th Ed., 239. W

(b) An executor who is also residuary legatee may call on his co-executor for an inventory. *Paul v. Nettleford*, 2 Add. 237. X

(c) A *cessate* or supplementary administrator may call upon the original administrator to exhibit an inventory and account. *Taylor v. Newton*, 1 Leo, 15, cited in *Triest and Coote*, 13th Ed., 239. X-1

(d) The Court may, in some cases, require *ex officio*, that an inventory shall be exhibited. *In the goods of Williams*, 3 Hagg. 217; *Acaster v. Anderson*, 1 Rob. 674, cited in *Ibid.* Y

(3) Court may accept admission of assets in lieu of inventory

The Court may in some cases accept an admission of assets in lieu of an inventory. *Burgess v. Marriot*, 3 Curt 424, cited in 1 Will. Exors., 10th Ed., 744. Z

(4) Lapse of time is a bar to calling for an inventory.

The Court will refuse to order the exhibition of an inventory after a great lapse of time from the death of the party. *Burgess v. Marriott*, *supra*. A

(5) Who can be called to give an inventory.

Not only an ordinary executor or administrator but the representatives of a deceased administrator, an administrator *durante absentia*, or *durante minoritate*, or *pendente lite* may be compelled to give in an inventory. *Ritchie v. Ress*, 1 Add. 158; *Bailey v. Bristove*, 2 Rob. 145; *Taylor v. Norton*, 1 Cas. temp. Lee 15; *Brotherton v. Hellier*, 2 Cas. temp. Lee 131, cited in 1 Will. Exors., 10th Ed., 746. B

(6) Form and contents of inventory in England.

In England, the inventory exhibited by an executor or administrator ought to contain a full, true and perfect description and estimate of all the chattels, real and personal, in possession and in action, to which the

I.—“*Inventory and account*”—(Concluded).

executor or administrator is entitled in the character, as distinguished from the heir, the widow, and the donee *mortis causa* of the testator or intestate. It must also distinguish such debts as are separate as distinguished from those that are doubtful or desperate. And it must be verified by oath. I Will. Exors., 10th Ed., 747. C

(7) What the inventory should contain.

The Court can only require that all deceased died possessed of should be included in the inventory. It cannot call for an account of the subsequent profits in his business. *Pitt v. Woodham*, 1 Hagg. 250, cited in *Ibid*. D

(8) Disobedience punished by contempt and attachment.

Disobedience to an order to file inventory and account is in English Law punishable by contempt and attachment. *Triest and Coote*, 13th Ed., 289. E

99. In all cases where a grant has been made of probate or [S. 277-A.]

Inventory to include property in any part of British India 1.

letters of administration intended to have effect throughout the whole of British India, the executor or [administrator] shall include in the inventory of the effects of the deceased all his

moveable or immoveable property situate in British India;

and the value of such property situate in each Province shall be separately stated in such inventory;

and the probate or letters of administration shall be chargeable with a fee corresponding to the entire amount or value of the property affected thereby wheresoever situate within British India.

(Old Acts).

Act VI of 1889:—S. 16 of this Act substituted (i) the words a “grant has been made” in place of the words “it is sought to obtain a grant,” and (ii) the word “administrator” for the words “the person applying for administration” in S. 99.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 277-A. of the Indian Succession Act, X of 1865. F

I.—“*Inventory to include property in any part of British India.*”

(1) Grant of probate or letters of administration to have effect throughout British India.

As to this, see S. 59, *supra*. G

(2) Court-fee payable in respect of probate and letters of administration.

As to this, see notes under S. 76, *supra*. H

(3) “Effects,” meaning.

As to this, see notes under S. 94, *supra*. I

(4) British India, definition.

As to this, see notes under S. 1, *supra*. J

(5) Province, definition.

As to this, see S. 3, *supra*. K

[S. 278.]

As to property of,
and debts owing to
deceased.

100. The executor or administrator shall collect, with reasonable diligence, the property of the deceased and the debts that were due ¹ to him at the time of his death.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 278 of the Indian Succession Act, X of 1865. L

1.—“The executor or administrator shall collect, . . . the property of the deceased and the debts . . . due.”

(1) “Collection,” what it implies.

“Collection” of assets does not necessarily involve their realization by sale or by actual receipt or possession. M.H.C.R. 171 (175-6). M

(2) Liability for unduly delaying to bring action.

If an executor or administrator, by unduly delaying to bring an action, has enabled a debtor of the deceased to avail himself of the Statute of Limitations, he will be personally liable. *Hayward v. Kinsey*, 12 Mad. 573, cited in 1 Will. Exors., 10th Ed., 749. N

(3) Liability for leaving debt outstanding from co-executor.

An executor is personally liable if he leave outstanding a debt due to the testator from a defaulting co-executor. *Styles v. Guy*, 1 Mac. and G. 422; *Candler v. Tillet*, 22 Beav. 257; *In re Gasquoine*, 1894, 1 Ch. 470, cited in *Hend.*, 3rd Ed., 343. O

(4) Liability for breach of trust.

If an executor commits a breach of trust in respect of trust property that has come to his hands, he is liable under S. 23 of the Indian Trusts Act, II of 1882, to make good the loss to the beneficiaries or legatees. 26 B. 301. P

(5) Liability of debtor-executor.

A debtor taking possession of the creditor's estate as executor is accountable for the amount of his debts to the estate as “assets.” 7 C.W.N. 476; *on appeal*, 31 C. 519 = 8 C.W.N. 500. Q

(6) It is only a proper representative that can recover the debts and claims of the estate.

A debtor to the estate of a deceased person, or one liable to contribute to or make good any portion of the assets of the deceased, can only be made answerable to the estate by a person who represents the deceased in the matter of the estate. 15 B.L.R. 296. R

(7) Procedure where beneficiaries desire that suit instituted by testator should not be continued by the executor.

An executor has a right to carry on a suit instituted by the deceased testator and get in the assets of his testator in order to meet possible claims on the estate. If the other parties to the suit beneficially interested in the estate desire that the suit should terminate, they should put the executor in funds to discharge the debts. 8 B. 241. S

N.B.—See also notes under S. 147, *infra*.

101. Funeral expenses to a reasonable amount, according to [S. 279.] the degree and quality of the deceased, and death-bed charges, including fees for medical attendance, and board and lodging for one month previous to his death, are to be paid before all debts ¹.

Expenses to be paid before all debts.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 279 of the Indian Succession Act, X of 1865. T

1.—“Funeral expenses to a reasonable amount.... are to be paid before all debts.”

(1) Funeral expenses, first charge on the assets.

Funeral expenses are payable out of the assets before any others. I Will. Exors., 10th Ed., 737, 751. U

(2) Funeral expenses must be reasonable as against creditors.

As against creditors, the funeral expenses must not be more than is reasonable and necessary having regard to the position of the deceased and the estate he leaves behind him. *Hancock v. Podmore*, 1 B. & Ad. 260; see I Will. Exors. 10th Ed., 737, 738. Y

(3) Executor's risk, if more than reasonable.

If the executor exceed reasonable expenses for the funeral, he takes the chance of the estate turning out insolvent. I Will. Exors., 10th Ed., 739. W

(4) Amount, varying.

No precise sum can be fixed to govern executors in all cases. It must obviously vary in every instance, not only with the station in life of each particular testator, but also with the price of the requisite articles at the particular place. *Ibid.*, citing *Edwards v. Edwards*, 2 Cr. & M. 612. X

(5) Standard in the case of a Hindu testator.

In the case of Hindu testator, sums usually expended at the funerals of persons of the same rank and fortune as the deceased, will be a test. *Mullik v. Mullik*, 1 Knapp. 245, cited in I Will. Exors. 10th Ed., 740. Y

(6) Funeral expenses in the case of a married woman.

In the case of a married woman, the husband is liable for her funeral expenses but where such expenses are made a charge by her will, or where she has an estate of her own which does not go to the husband, he may be recouped the funeral expenses. *Wisher v. Dobie*, 2 K. & J. 647; *Lightbown v. M'Myn*, 33 Ch. D. 575, cited in Theob; 6th Ed., 768. Z

N.B.—See also notes under S. 97, *supra*.

102. The expenses of obtaining probate or letters of administration, including the costs incurred for or in respect of any judicial proceedings that may be necessary for administering the estate, are to be paid next ¹ after the funeral expenses and death-bed charges. [S. 280.]

Expenses to be paid next after such expenses.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 290 of the Indian Succession Act, X of 1865. A

1.—“The expenses of obtaining probate . . . including the costs incurred for or in respect of any judicial proceedings . . . are to be paid next.”

(1) “Executorship or testamentary expenses,” what it includes.

- (i) Expenses incident to the proper performance of the duty of an executor.
- (ii) Probate expenses.
- (iii) The costs incurred by executors in obtaining the advice of solicitors or counsel as to the distribution of the testator's estate.
- (iv) The costs of executors and other parties in an action for the administration of the testator's personal estate.
- (v) The testator's funeral expenses.
- (vi) Expenses incurred by executors for the protection of specific legacies.
- (vii) Payment by the executors in discharge of debts falling due from the testator's estate after his death, *e.g.*, rent.

Per Jessel M.R. in Sharp v. Lush, 10th Ch. D. 468 (470), *cited in* I Will. Exors., 10th Ed., 752. B

(2) No distinction between “executorship expenses” and “testamentary expenses.”

There is no distinction in meaning between “executorship expenses” and “testamentary expenses.” *Sharp v. Lush*, 10 Ch. D. 468 (470). *per Jessel, M.R.* C

(3) “Funeral and other expenses” includes costs of an administration suit.

Costs of an administration suit have been held to be included under “funeral and other expenses,” and “legal expenses.” *Webb v. De Beauvoisin*, 31 Beav. 573; *Coventry v. Coventry*, 2 Dr. & Sm. 470. D

(4) “Testamentary expenses” does not include costs of unsuccessfully impeaching the will.

The plaintiff's costs of an unsuccessful action impeaching the will are not testamentary expenses. *Godwin v. Prince*, 1898, 2 Ch. 225. E

(5) “Costs of administration” includes costs of getting in the estate and payment of duties.

The costs of administration include the costs of getting in any part of the real and personal estate, which is in a foreign country, and the payment of all duties necessary for that purpose. *Peter v. Stirling*, 10 Ch. D. 279; *Brown v. Maurice*, 75 L.T. 415. F

(6) “Costs of administration” include amount paid for standing surety.

The amount paid or agreed to be paid by an administrator to a person for standing surety for due administration of the estate is an expense in administering the estate within the meaning of S. 102 of the Probate and Administration Act, and is a just charge on the estate. 31 P.R. (1906) = 133 P.L.R. (1906). G

1.—“The expenses of obtaining probate....including the costs incurred for or in respect of any judicial proceedings....are to be paid next”

—(Continued).

(7) “Judicial proceedings etc.,” to what it refers.

The words “judicial proceedings that may be necessary” refer to administration suits. 17 B. 637; Stokes 177. H

(8) In taking accounts, administrator must be given credit for expenses and costs mentioned in the section.

Where an administrator was held liable for loss to the estate due to his neglect to get in part of the deceased's property, he was given credit for the amount of the expenses incurred by him in obtaining letters of administration and the costs of any judicial proceeding necessary for administering the estate. 17 B. 637. I

(9) Fund primarily liable for probate expenses.

The fund primarily liable for the costs and expenses of obtaining probate is the residuary estate ordinarily. 21 B. 75. J

(10) Executor not entitled to remuneration.

(a) Although an executor or administrator is entitled to his costs and expenses, he is not entitled to any remuneration unless it be given to him by the will. Ph. and Trev. 411. K

(b) See also notes under S. 6, *supra*. L

(11) Commission not to be charged by executor or administrator other than the Administrator-General.

As to this, see S. 56 of Act II of 1874, now repealed by S. 4 of Act V of 1902.M

(12) Practice and procedure in administration suits.

As to this, see C.P.C., 1908, O. 20, r. 13. N

Costs in testamentary causes.

(1) Costs are in the discretion of the Court.

(a) As a general rule, the question of costs is in the discretion of the Court. Triest and Coote, 13th Ed., 509. O

(b) Costs are in the discretion of the Court and may be directed to be paid out of the estate of the deceased in a suitable case. 13 C.W.N. 556 (563). P

(c) See also S. 35, C.P.C., 1908. Q

(2) This rule is not affected by the section.

The section does not justify the inference that, if one beneficiary sets up a false will and another beneficiary successfully resists his application, the latter is entitled, as a matter of right, to be paid his costs out of the estate. 13 C.W.N. 557 (563). R

(3) Executor proving will *in solemn form* entitled to cost out of the estate.

An executor who proves a will *in solemn form*, whether of his own motion, or on citation by parties interested, is entitled to take his costs out of the estate even without an order of the Court. Triest and Coote, 13th Ed., 509. S

1.—“The expenses of obtaining probate....including the costs incurred for or in respect of any judicial proceedings....are to be paid next”

—(Continued).

- (4) **Legatee proving will in solemn form entitled to costs out of the estate under order of Court.**

A residuary or other legatee who proves a will in solemn form is also entitled to costs out of the estate, but he should apply to the Court for them. *Williams v. Goude*, 1 Hagg. 610; *Thorne v. Rooke*, 2 Curt 831; *Sutton v. Draz*, 2 Phil. 323, cited in *Triest. & Coote*, 13th Ed., 510. T

- (5) **Party calling for proof and not guilty of misconduct is entitled to costs out of the estate.**

(a) Where a party entitled in distribution simply calls for proof of a will, and merely cross-examines the witnesses, without any misconduct or vexatious procedure in the suit, he is entitled to have his costs out of the estate. *Prinsep v. Dyce Sombre*, 10 Moo. P.C. 232. U

(b) For a case in which a caveatrix who not content with requiring proof in solemn form and cross-examining the witnesses, had made charges against the plaintiff, was condemned in costs. see 5 C.W.N. 261. Y

- (6) **Lord Penzance's two rules as to costs.**

(i) If the cause of litigation takes its origin in the fault of the testator or those interested in the residue, the costs may be paid out of the estate. *Per Lord Penzance in Mitchell v. Gard*, 3 Sw. & Tr. 275. W

(ii) If there is a sufficient and probable ground, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party will be relieved from the costs of his successful opponent. (*Ibid.*) X

- (7) **No hard and fast rule that a party is entitled to costs, because there is *justa causa litigandi*.**

But it does not follow that a party is entitled to his costs because there is *justa causa litigandi*. *Barwick v. Mullings*, 2 Hag. 234, cited in 13 C.W.N. 556 (563). Y

- (8) **In what cases the costs of an unsuccessful party will be paid out of the estate.**

(i) When a party has been led into the contest, whether as plaintiff or defendant, by the state in which the deceased had left his papers. *Hillman v. Walker*, 1 Hagg. 75; *Blake v. Knight*, 2 N. of Cas. 346; *Abbott v. Peters*, 4 Hagg. 381; *Armstrong v. Huddleston*, 1 Moo. P.C. 491; *Ayers v. Ayers*, 5 N. of Cas. 381, cited in *Triest. and Coote*, 13th Ed., 512. Z

(ii) Where the validity of a will had been contested on a doubtful point of law. *Robins v. Dolphin*, 1 S. & T. 518; *Brooke v. Kent*, 3 Moo. P.C. 334, cited in *Ibid.* A

(iii) Where there was a reasonable doubt as to the testator's testamentary competency at the time of the execution of the will. *Frere v. Peacock*, 1 Rob. Ecc. Rep. 456; *Waring v. Waring*, 5 N. of Cas. 324; *Borlase v. Borlase*, 4 N. of Cas. 140, cited in *Ibid.* B

(iv) Where a party principally benefited by the will opposed had been guilty of improper act, which exposed him to the suspicion of fraud or undue influence in procuring its execution. *Browning v. Budd*, 6 Moo. P. C. 430, cited in *Ibid.* C

1.—“The expenses of obtaining probate....including the costs incurred for or in respect of any judicial proceedings....are to be paid next”

—(Continued).

- (v) Where a case from its peculiar circumstances pre-eminently called for investigation. *Jones v. Godrich*, 5 Moo. P. C. 16; *Coventry v. Williams*, 3 N. of Cas. 172; *Symons v. Tozer*, 3 N. of Cas. 55; *Keating v. Brook*, 4 N. of Cas. 273; *Gregory's Case*, 4 N. of Cas. 643, cited in *Triest. & Coote*, 13th Ed., 513. D
- (9) **In what cases unsuccessful party will forfeit his claim to costs out of the estate.**
 - (i) Where by his plea or his cross-examination he attempted to make a case of fraud or conspiracy not justified by the evidence. *Barry v. Butlin*. 2 Moo. P. C. 493 cited in *Triest & Coote*, 13th Ed., 513. E
 - (ii) When, prior to the commencement of the suit, circumstances, which *prima facie* cast suspicion, had or might have been removed by inquiries which he had made or had the opportunities of making. *Nichols v. Binns*, 1 S. & T. 239. F
 - (iii) When from circumstances disclosed during the progress of the cause, he might have earlier judged that he ought not to have proceeded further in it. *Dean v. Russell*, 3 Phill. 334, cited in *Ibid*. G
 - (iv) Where an applicant for letters of administration concealed the existence and elaims, of which he was aware, of the relatives of the deceased, on the application being dismissed, he was ordered to pay the costs of the application and of the caveats entered by the relatives of the deceased. 2 B. 9. H
 - (v) Where the construction of the will was not so difficult as to have required the assistance of the High Court, held that the estate should not bear the costs. 21 C. 688. I
- (10) **When each party will be directed to bear his own costs.**

Where neither the testator by his own conduct, nor the executors or persons interested under the will by their conduct, have brought about the litigation as to its validity, but the opponents of the will, after due inquiry into the facts, entertained a *bona fide* belief in the existence of a state of things, which, if it did exist, would justify litigation, and the opposition is unsuccessful, each party must pay his own costs. *Davies v. Gregory*, 3 P. & D. 23; *Prinsep v. Dyce Sombre*, 10 Moo. P. C. 232. J
- (11) **When probate refused to executor, costs in discretion of Court.**

When probate is refused to the executor, it is in the discretion of the Court to grant or refuse him his costs out of the estate, or to condemn him in the costs incurred by the party who has successfully opposed the probate. *Triest. & Coote*, 13th Ed., 511. K
- (12) **Cases of unsuccessful executor being condemned in Courts.**
 - (i) Where the executor was himself principally benefited by the will, and there were strong suspicions of fraud against him. *Dodge v. Meech*, 1 Hagg. 612, cited in *Triest. & Coote*, 13th Ed., 513. L
 - (ii) Where the will was found to have been unduly obtained by the executor from his wife. *Marsh v. Tyrrell*, 2 Hogg. 141; *Baker v. Butt*, 1 Curt. 172. M

1.—"The expenses of obtaining probate....including the costs incurred for or in respect of any judicial proceedings....are to be paid next"

—(Concluded).

(13) Costs of party successfully contesting later will.

- (a) When a next-of-kin or persons entitled in distribution, or an executor or legatee of a former will, successfully contests the validity of a later will, the Court will give him costs out of the estate, or against the unsuccessful party. *Critchell v. Critchell*, 3 S. & T. 41. **N**
- (b) Next-of-kin and executors of former wills, even when unsuccessful in a suit stand in a more favourable position than legatees do in respect of their rights and liabilities for costs. *Trist & Coote*, 13th Ed., 514. **O**
- (c) Thus, where after the grant of probate of a prior will probate of a subsequent inconsistent will was also granted, *held* that under the circumstances of the case, the executors of both wills had the right to be paid their costs out of the estate. So far as the estate was not sufficient to pay these costs, each party was to bear his own costs. 25 C. 553. **P**

(14) Security for costs, when required.

- (a) In England, security for costs will be required only from a plaintiff who is absent from or about to leave the country, but not from a person who is practically the defendant in the suit. *Robson v. Robson*, 3 S. & T. 568, *cited* in *Trist & Coote*, 13th Ed., 522. **Q**
- (b) For the law in India, see C.P.C., 1908, O. 25, r. 1. **R**

(15) Security for costs, in suits by married women.

In England since the Married Women's Property Act, 1882, married women, suing as plaintiffs without their husbands being joined, are not required to give security for costs. *Threifall v. Wilson*, 8 P.D. 18; *cited* in *Trist and Coote*, 13th Ed., 522. **S**

[S. 281.]

103. Wages due for services rendered to the deceased within three months next preceding his death by any labourer, artizan or domestic servant are next to be paid, and then the other debts of the deceased according to their respective priorities (if any) ².

Wages for certain services to be next paid ¹, and then other debts.

(Notes).
General.

Corresponding Indian Law.

This section corresponds to S. 281 of the Indian Succession Act, X of 1865, but contains the words "according to their respective priorities (if any)" added at the end of the section. **T**

1.—"Wages for certain services to be next paid."

(1) Preferential payments in the administration of insolvent estate—English Law.

In England, in the administration of *insolvent estate* by the Court, the clauses as to preferential payments in the English Bankruptcy Act are made applicable by which priority is given for the payment of (a) wages of clerks and servants for services rendered during *four* months next before the death not exceeding £50, and (b) wages of labourers and workmen, not exceeding £25 for services rendered during *two* months next before the death. **U**

1.—“Wages for certain services to be next paid”—(Concluded).

(2) Preferential payments in the administration of insolvent estate—Indian Law.

As to this, see S. 33, Provincial Insolvency Act, III of 1907, and S. 49, Presidency Towns Insolvency Act, III of 1909. Y

(3) Preferential payment under Regimental Debts Act.

For preferential charges payable out of the estate of a person dying while subject to Military law, see S. 2, Regimental Debts Act, 1893, St. 56, Vict. C. 5. W

(4) “Labourer” and “artizan,” scope of the words.

(a) The words “labourer” and “artizan” denote such workman as do not come within the category of “domestic servant,” but come within the operation of Act XIII of 1859 which does not apply to such servants. 3 B.L.R. a.cr. 32. X

(b) A tailor is an artizan, not in any sense, a servant. 3 B.H.C.R. App 1 (21). Y

(5) “Domestic servant” scope of the words.

(a) The expression “domestic servant” would not be confined to the servants who actually worked in the house, but would include other persons who ordinarily form a part of an Indian establishment, such as coachmen, syces, palki bearers, and gardeners. Ph. and Trev., 413, citing *Phear, J.*, in 8 B.L.R. 244 (250). Z

(b) The expression “domestic servant” would, having regard to the conditions of life in India, bear a larger interpretation than it does in England. Ph. and Trev., 412. A

(c) A fair test as to the existence of the relation of master and servant is—whether or not the person in question was bound to give up his whole time. 3 B.H.C.R. App. 1 (21). B

(d) The word ‘servants’ is not necessarily confined to servants living in the house. It has been held to include a farm-bailiff, a gardener and under-gardener and a house steward. *Building v. Ellice*, 9 Jur. (Eng.) 936; *Thrupp v. Collett*, 26 Beav. 147; *Armstrong v. Clavering*, 27 Beav. 226. C

(e) But such persons as stewards of Courts, a coachman provided by a job-master, or a boy occasionally employed, are not included under the term ‘servants.’ *Townshend v. Windham*, 2 Vern. 546; *Chilcott v. Bomley*, 12 Ves. 114; *Thrupp v. Collett*, 26 Beav. 147. D

(f) The term “domestic” or “household” servants excludes outdoor servants. *Ogle v. Morgan*, 1 D.M. & G. 359; *Cochrane v. Ogilby*, (1903) 1 Ir. 525. E

(g) As to when a *sirang* on board a steamer may come within the description of “domestic servant” see 8 B.L.R. 244. F

(h) As to when a washerman may come within the description of “domestic servant” see 9 B.L.R. App. 4. G

2.—“According to their respective priorities (if any).”

What priorities allowed.

As to this, see notes under S. 104, *infra*.

H

[S. 282.]

Save as aforesaid,
all debts to be paid
equally and rate-
ably.

104. Save as aforesaid, no creditor is to have
a right of priority over another ¹.

But the executor or administrator shall pay all such debts ² as
he knows of ³, including his own ⁴, equally and rateably, as far as
the assets of the deceased will extend ⁵.

(Notes).
General.

(1) Corresponding Indian Law.

This section corresponds to S. 282 of the Indian Succession Act, X of 1866,
but omits the words "by reason that his debt is secured by an instru-
ment under seal or on any other account" from the first para. I

(2) Scope and object of the section.

This section and S. 85 of the Administrator-General's Act, II of 1874, deal
with the creditor's rights as regards the general assets of their
deceased debtor, and apart from any question of lien, the object is to
prevent any one creditor obtaining an advantage over another in
respect of the payment of his debt, and to provide for the payment
of all claims proportionately out of the assets of the estate. *Per Sale*,
J., in 25 C. 54 = 1 C.W.N. 500. J

***1.—"Save as aforesaid, no creditor is to have a right of priority over
another."***

(1) Crown debts have priority both in English and in Indian Law.

(a) Debts due to the Crown claim precedence of all debts. I Will. Exors.,
10th Ed., 756. K

(b) In the case of a suit *in forma pauperis*, the Court-fees form a Crown debt
for which the Crown is entitled in priority over all other creditors.
33 C. 1040. L

(c) The charge of Government for Court-fees is entitled to precedence over all
other creditors even in cases in which the sale-proceeds are realised
out of property nor the subject-matter of the suit. 33 C. 104C = 10
C.W.N. 857. M

(2) Priority of executor advancing his own money for the estate.

(a) An executor advancing his own money for purposes of the estate is entitled
to be paid in full in priority to the creditors with interest on such
money. *Small v. Wing*, 5 Bro. P.C. 72. N

(b) Executors who have used their own moneys for the purposes of the estate
are entitled to be allowed such money in taking the accounts of the
estate. (*Spackman v. Hilbrook*, 2 Gif. 198), and such right cannot be
affected by limitation before such accounts are taken. 20 B. 571
(593-4). O

(3) Priority of judgment-debts in English Law.

(a) In English law judgments obtained against the deceased have precedence
over all other debts. I Will. Exors., 10th Ed., 762. P

(b) Judgments obtained against executors, have no priority except as to debts
of equal degree. I Will. Exors. 10th Ed., 764. Q

(c) But as between the executor and the creditor who has obtained judgment
against him, the judgment must be satisfied without reference to the
state of the assets or the claims of superior creditors. I Will. Exors.
10th Ed., 764. R

1. —“*Save as aforesaid, no creditor is to have a right of priority over another*”—(Continued).

(4) Priority of judgment-debts in Indian law not affected by S. 104.

- (i) Where a person obtains a decree against an executor or administrator, he is entitled to have his decree satisfied out of the assets of the deceased, and S. 104 does not interfere with that right. 17 W.R. 513=12 B.L.R. 297. See, also, 11 P.R. 1879. **S**
- (ii) The holder of a decree for money, the judgment-debtor dying intestate, is entitled to have his decree satisfied out of the assets of the deceased in the hands of the Administrator-General, though the assets may not be sufficient to pay off all claims against the estate. 10 C. 929. **T**
- (iii) The right of a decree-holder under S. 234, C.P.C., 1882, to have his debt paid out of the assets of a deceased judgment-debtor in the hands of his legal representative which have not yet been duly disposed of, is not affected by this section which directs an equal and rateable distribution of the assets of a deceased judgment-debtor. 22 M. 194. **U**
- (iv) The effect of this would be to give to a judgment-creditor of the testator priority over other creditors, but any other creditor could protect himself and his fellow creditors by bringing a suit for the administration of the estate. Ph. & Trev. 413. **V**

(5) What the Court should do to prevent such priority.

A creditor's action against a deceased person's estate must be treated as an administration suit and the plaint in such suit must be amended on that basis. Where the plaintiff is not willing to amend, the Court, if it finds the claim proved, should pass a decree simply giving him a declaration of the debt due and a declaration besides that he is entitled to satisfaction of the decree according to law in due course of administration and not otherwise—so as to prevent him from getting an advantage over other creditors. 29 B. 96 (101). **W**

(6) A judgment-debt does not create a charge on the assets.

A decree in favour of a creditor to the estate of a deceased testator, is a mere money-decree, and has not the effect of creating a charge upon the property. 10 C.W.N. 38=2 C.L.J. 138, 141. **X**

(7) Creditor obtaining attachment and sale before judgment has no priority.

A creditor obtaining attachment and sale of the property of the deceased debtor before judgment is not entitled to payment otherwise than rateably with the other creditors. 6 M.H.C.R. 346. **Y**

(8) Specialty debts have no priority over simple contract debts even in English Law.

Even in England, owing to St. 33 and 34 Vict., C. 46,—Hindu Palmer's Act, 1869—all specialty and simple contract debts of deceased persons stand in equal degree. **Z**

(9) Both under English and Indian law, the bankruptcy rules as to payment and proof of debts are applicable in the administration of insolvent estates.

- (a) In England, S. 10 of the Judicature Act, 1875—St. 38 and 39 Vict., C. 77—imports the Bankruptcy Rules as to payment of debts into the administration in the Chancery Division of the estate of a person, whose estate may prove to be insufficient for the payment in full of his debts and liabilities. See I Will. Exors., 10th Ed., 759. **A**

1.—“Save as aforesaid, no creditor is to have a right of priority over another”—(Concluded).

(b) Thus, in the case of insolvent estates, a contingent creditor can in England have his debt valued and proved immediately. *I Will. Exors.*, 10th Ed., 773. B

(c) For the corresponding provision in Indian Law, see C. P. C., 1908, O. 20, r. 18. C

(10) Preferential payments in the administration of insolvent estates.

As to this, see notes under S. 103, *supra*. D

(11) Right of executor to prefer one creditor over another of equal degree in English Law.

(a) In England, the legal personal representative has a right to prefer a creditor over other creditors of equal degree. *Theob.*, 6th Ed., 776; *I Will. Exors.*, 10th Ed., 782. E

(b) Thus, an executor may prefer a statute-barred debt unless it has been judicially declared to be barred. *Midgeley v. Midgeley*, 1893, 3 Ch. 282. F

(c) And he may prefer a debt that does not carry interest before a debt, that does. *Cooke v. Stevens*, 1898, 1 Ch. 162 (174). G

(d) The right of an executor to pay in preference ceases after a decree in an administration suit by a creditor. *I Will. Exors.*, 10th Ed., 783. H

(12) Report of the Law Commissioners—Executor's right of preference and right of retainer not extended to India.

We do not propose to extend to India the rule which enables an executor to pay any creditor (whether himself or another person) in preference to another creditor of equal degree. We have provided that funeral and death-bed expenses and charges of probate and administration are to be first paid, then wages due to any labourer, artisan or domestic servant employed by the deceased; and that in respect of no other debt shall a creditor be entitled to preference either by reason of its being secured by deed under seal, or on any other account. Report of the Law Commissioners on the Succession Act. *Gazette of India*, July 1st, 1864. I

2.—“But the executor or administrator shall pay all such debts.”

(1) Liability to pay calls is a debt under the section.

A liability to pay calls is a debt within the meaning of S. 104. 8 B.H.C.R.O. C. 20. J

(2) Holder of a voluntary bond has no claim on the estate.

The holder of a promissory note or similar instrument given without consideration has no claim upon the estate. *In re Whitaker*, 42 Ch. D. 119. K

(3) In India, in the case of debts, limitation bars the remedy, without extinguishing the right.

As far as regards debts, the Indian Laws of Limitation merely bar the remedy but do not extinguish the right. 6 C. 340 = 7 C.L.R. 121, *overruling* 4 C. 283 = 3 C.L.R. 386. L

2.—“*But the executor or administrator shall pay all such debts*”

—(Concluded).

(4) Executor entitled to pay a barred-debt.

An executor may pay a debt justly due by his testator though barred by the Statute of Limitation, and will, in equity, be allowed credit for such payment. *Per* Lord Hardwicke in *Norton v. Frecker*, 1 Atk. 525; *Stahlschmidt v. Lett*, 1 Sm. & Gif. 415; cited in 10 B.H.C.R. 206 (214). M

(5) An administrator, like an executor can pay and retain a barred debt.

As to this, see notes, *supra*.

N

(6) Administrator-General may pay a barred debt.

(a) A debt not being extinguished by the operation of the Limitation Act, the Administrator-General may pay a barred debt. 1 M. 267. O

(b) For, the intention of the Legislature was that the Administrator-General should hold, administer, and be accountable for the estate under his charge not merely as an officer of the Court, but as an ordinary executor or administrator. 1 M. 267 (276). P

(7) Executor cannot pay a debt judicially declared to be time-barred.

An executor cannot pay a debt which has been judicially declared to be barred by the Statute of Limitations. *Midgeley v. Midgeley*, 1893, 3 Ch. 282. Q

(8) Executor cannot pay a debt which is not enforceable under the Statute of Frauds.

Although an executor may pay a debt barred by the Statute of Limitations, he cannot pay a debt to a creditor who is prevented from enforcing it by the Statute of Frauds. *Re Rowson*, 29 Ch. D. 358. R

3.—“*as he knows of.*”

(1) Knowledge must be actual and not constructive.

To charge an executor or administrator for improper distribution of assets, his knowledge must be actual, as distinguished from a constructive or imputable knowledge. 8 B.H.C.R. O.C. 20. S

(2) Want of notice of debt will not *per se* excuse executor from payment.

The mere circumstance of want of notice of a debt or claim against the estate of the deceased will not excuse an executor or administrator from the payment or satisfaction of it, if the assets were originally sufficient for the purpose notwithstanding that, in ignorance of the existence of the debt or claim, he has *bona fide* handed over the assets to legatees or parties entitled in distribution. *Cowper's case*, 1 Esp. N.P.C. 275; *Norman v. Baldry*, 6 Sim 621; *Smith v. Day*, 2 Mees & W. 684; *Knatchbull v. Farnhead*, 3 My & Cr. 122; *Hill v. Gomme*, 1 Beav. 540; cited in II Will. Exors., 10th Ed., 1082. T

4.—“including his own.”

(1) How far executor can carry on testator's business.

As to this, see notes under S. 146, *infra*.

U

(2) Debts incurred by the executor, not directly enforceable against the estate.

(a) Debts incurred by the executor, *e.g.*, in carrying on the business of the testator, are the executor's own debts, and the creditors to whom these debts are owing, have no direct remedy against the testator's estate. They cannot prove against the estate or take the testator's assets in execution. Theob, 6th Ed., 790 and see cases therein *cited*.

Y

(b) An executor cannot, under ordinary circumstances, create obligations binding on the estate in favour of creditors. 30 C. 937 = 7 C.W.N. 799.

W

(c) See also notes under S. 89, *supra*.

X

(3) Executor's right of indemnity in respect of such debts.

But, if the debts are properly incurred, the executor is entitled to be indemnified against them out of the estate, and the creditors are in equity entitled to the benefit of the executor's indemnity. *Ibid.*; see *Douse v. Gorton* (1891) A.C. 190; *In re Brooke* (1894), 2 Ch. 600.

Y

(4) Such right of indemnity subject to equities.

The right to indemnity being the executor's right, is subject to any equities between him and the estate; *e.g.*, if upon taking the accounts, he is indebted to the estate, his right, and therefore the right of his creditors, to indemnity, is diminished by the amount of his indebtedness. (*Ibid.*)

Z

(5) Rights as between creditors of the testator and executor.

(a) As against the creditors of the testator, the executor carrying on the business will be entitled to indemnity only if the carrying on was reasonable in order to pay the debts, or was assented to by the creditors.

A

(b) If it was not reasonable, and there was no assent, it is open to the testator's creditors to repudiate the executor's act and to treat it as a *devastavit* or to adopt it, in which latter case the executor is entitled to be indemnified against the debts he has incurred. Through the medium and to extent of such indemnity, the executor's creditors may acquire priority over the testator's creditors.

A1

(c) The same result follows if the creditors stand by and allow the business to be carried on. Theob, 6th Ed., 791; *citing Douse v. Gorton* (1891), A.C. 190; *Brooke v. Brooke* (1894), 2 Ch. 600; *Hodges v. Hodges* (1899), 1 Ir. 480.

A2

(6) Rights as between beneficiaries and creditors of the executor.

As between the beneficiaries and the creditors of the executor, the rights depend upon the terms of the will, and for this purpose persons dealing with the executor must be taken to know the contents of the will. Theob, 6th Ed., 791; *citing Cutbush v. Cutbush*, 1 Beav. 184; *Callagher v. Ferries*, 7 Ir. 489.

B

Right of retainer of executor for his own debt in English Law.

(i) The right, described.

In England, an executor or administrator has a right to retain for his own debt due to him from the deceased, in preference to all other creditors of equal degree. 1 Will. Exors., 10th Ed., 795.

C

(ii) No right of retainer against real estate.

The Land Transfer Act, 1897, which vests real estate also in the personal representative, does not give a right of retainer against the real estate. *Holder v. Williams*. (1904), 1 Ch. 52.

D

4.—“Including his own”—(Continued).

(iii) Right of retainer must be asserted and when.

- (a) The right of retainer must be asserted; it does not act automatically; but it need not be asserted, until something is done to interfere with the right; e.g., it may be exercised even after an order to administer the estate in bankruptcy as regards assets in the executor's possession at that time. *In re Rhoades* (1899), 2 Q.B. 347; cited in Theob., 6th Ed., 778. E
- (b) The right of retainer is not lost by the administration bond, nor by judgment in creditor's action, nor by proof of the debt in such action, nor by payment into Court. Theob., 6th Ed., 781; and see cases therein cited. F

(iv) To what assets the right of retainer is limited.

The right is limited to such legal assets as come into the possession or under the control of the legal personal representative, or are paid into Court during his life. *Norton v. Compton*, 30 Ch. D. 15; and see *Pulman v. Merdows*, 1901, 1 Ch. 233; cited in I Will. Exors., 10th Ed., 787. G

(v) When the assets may be retained *in specie*.

Where the assets are less than the debt, the assets may be retained *in specie*. *In re Gilbert*, 1898, 1 Q.B. 282. H

(vi) Against whom the right can be exercised.

- (a) The right of retainer could only be exercised against creditors of equal degree. Theob., 6th Ed., 779 and see cases therein cited. I
- (b) If, when the debt is retained, the legal personal representative has no notice of a creditor of higher degree than himself, he cannot afterwards be sued by such a creditor. *Wingfield v. Erskine*, 1898, 2 Ch. 562. J

(vii) To what debts, such right extends.

- (a) A debt owing to the legal representative jointly with others. *Crowder v. Stewart*, 16 Ch. D. 368; *In re Hubback*, 29 Ch. D. 934. K
- (b) A debt owing to one of several representatives. *Kent v. Pickering*, 2 Kee. 1; *Morris v. Morris*, 10 Ch. 68. L
- (c) A debt owing to the legal personal representative as trustee. *For v. Garrett*, 28 Beav. 18; *Thompson v. Cooper*, 1 Coll. 85; *Plumer v. Marchant*, 3 Burr. 1380. M
- (d) A debt paid by the legal personal representative as surety for the deceased. *Boyd v. Brooks*, 34 Beav. 7; *Lee v. Nuttall*, 12 Ch. D. 61. N
- (e) A claim for damages for breach of a pecuniary contract, for which there is a certain standard. *Loane v. Casey*, 2 W. Bl. 965; *Norton v. Compton*, 30 Ch. D. 15. O
- (f) A debt, barred by Statute, but not judicially decided to be so. *Hall v. Walker*, 4 K. & J. 166; *Midgeley v. Midgeley*, 1893, 3 Ch. 382; Theob., 6th Ed., 780. P
- (g) It is doubtful whether a legal personal representative can buy up a debt due by the testator and then retain it. Theob., 6th Ed., 781. Q
- (h) An officer of a bank, who is administrator, has no right to retain a debt due to the bank. *Louison v. Harvey*, 85 L.T. 273. R

4.—“Including his own”—(Concluded).

- (viii) **Right of retainer has priority over costs of administration action in English law.**

In England, an executor's right of retainer has priority over costs of an administration action. *Chissum v. Dewes*, 5 Russ. 29. **S**

- (ix) **Right of proof after retainer.**

If the legal personal representative, by exercising the right of retainer, has paid himself in part, he cannot prove against assets which cannot be retained, until the other creditors have been paid a dividend equal to the dividend he received by means of the retainer. *Bain v. Sadler*, 12 Eq. 57C; cited in Theob, 6th Ed., 782. **T**

- (x) **How far a creditor-administrator can exercise the right.**

A creditor who has obtained a grant of administration can retain his debt, but the Court generally takes an undertaking from him to pay all debts equally, without any preference of his own. *I Will. Exors.*, 10th Ed., 793. **U**

- (xi) **How far an executor can exercise the right of retainer under S. 104.**

(a) Under S. 104 an executor or administrator has, as in English law, a right to retain for his own debt due to him from the deceased. 6 C. 355. **V**

(b) But this right is not in priority or preference to any other creditor of equal degree, as in England, for the debts should be paid “equally and rateably.” See the Law Commissioner's Report, cited *supra*. **W**

- (xii) **Administrator like an executor can pay and retain a barred debt in India.**

An administrator has equal power and privilege of paying and retaining a debt, though barred by Statute, as an executor. 1 M. 267 (273). **X**

- (xiii) **Administrator-General, has the same right of retainer as the executor.**

The Administrator-General has the same right of retainer in satisfaction of his own debt as that which an ordinary executor or administrator has. 2 M.H.C.R. 255. **Y**

5.—“Equally and rateably, as far as the assets of the deceased will extend.”

- (1) “Rateably,” meaning.

The rateable payment referred to in S. 104 is rateable payment *out of the assets*; not out of the net income of the estate or any other specific part of the assets. 25 C. 54=1 C.W.N. 500. **Z**

- (2) **Liability of administrator who pays debts otherwise than equally and rateably.**

An administrator who pays such debts *as he knows* of otherwise than equally and rateably as far as the assets of the deceased will extend, in accordance with S. 104 is *personally* liable for any loss occasioned to a creditor of the deceased by such improper distribution of the assets. In order to charge such administrator, his knowledge must be *actual*, as distinguished from a constructive or imputable knowledge. 8 B.H. C.R. O.C. 20. **A**

- (3) **“Equal and rateable” payment, when necessary.**

The provision for “equal and rateable payment” applies only in cases where the general assets are or might be insufficient for the payment in full of the claim of all the creditors. See 25 C. 54=1 C.W.N. 500. **B**

- (4) **‘Assets,’ meaning.**

As to this, see notes under S. 62, *supra*. **C**

Miscellaneous.

(1) Charge of debts by testator—Effect.

(a) A charge of debts generally by a testator upon his property or any part of it will not affect limitation, as it does not at all vary the legal liabilities of the parties or make any difference with respect to the effect and operation of the Statute itself; the executors take the estate, subject to the claim of the creditors, being in point of law trustees for the creditors, the charge by the testator adding nothing to their legal liabilities. 7 C. 772=9 C.L.R. 327. **D**

(b) But, when particular property is given upon trust to pay a particular debt, it is otherwise, and the trustee has a new duty, so that there arises a trust within S. 10 of the Limitation Act. 7 C. 772=9 C.L.R. 327. **E**

(c) Neither a general direction in a will for payment of the testator's debt out of his estate, nor a decree in a suit by his creditor against the heirs in their representative capacity, which by its terms is to be satisfied out of the assets of the testator, would create a charge on the testator's property mortgaged by the heir, so as to prevent the mortgagee from executing his mortgage decree against such property. 9 C. 406=11 C. L. R. 565. **F**

(d) A direction in the will for the payment of the testator's debts is only a general direction to pay up all his debts out of the estate, and does not create any charge thereupon. 10 C.W.N. 38=2 C.L.J. 138 (141). **G**

(e) A direction in a will devising immoveables to repay a debt due by the testator to the devisee's father with interest, was construed to be a charge on the immoveables. 15 C. 66=14 I.A. 137 (P.C.). **H**

(2) Decree or execution against person in possession of estate of testator before the grant of probate, how far valid.

As to this, see notes under S. 12, *supra*. **I**

(3) Claim of wife for money lent to the husband.

In England by the Married Woman's Property Act, 1882, a claim for money of the wife lent by her to her husband for the purpose of any trade or business carried on by him is postponed to the claims of other creditors. See *Tarn v. Emmerson*, 1895, 1 Ch. 652. **J**

(4) Execution of decree against legal representative of deceased.

As to this, see Ss. 50 and 52, C.P.C., 1908. **K**

(5) Procedure in suits by and against executors and administrators.

As to this, see Order 31, C.P.C., 1908. **L**

(6) Creditor's suits against the Administrator-General.

As to this, see S. 35 of Act II of 1874; explained in 25 C. 54=1 C.W.N. 500; 10 C. 929. **M**

(7) Right of creditor to demand payment in full from assets in hands of Administrator-General.

There is nothing in S. 35 of the Administrator-General's Act, II of 1874, which qualifies or restricts or otherwise interferes with the right of a creditor to demand immediate payment of his claim in full, when the realisable assets in the hands of the Administrator-General are sufficient for the immediate payment of all claims in full. 25 C. 54 (62). **N**

Miscellaneous—(Continued).

(8) Procedure on executor's admission of assets in suit by creditor.

In a suit by a creditor, if his demand be uncontested or proved, and the executor admits assets, the plaintiff is entitled at the hearing to an order for immediate payment without taking the accounts. The admission of assets for the payment of a debt is also an admission of assets for the purposes of the suit and extends to costs, if the Court thinks fit to give them. 25 C. 54 = 1 C.W.N. 500. O

(9) Procedure where executor does not admit assets.

Where the executor does not admit assets, the proper course, where the Court has jurisdiction, is to make an order for the administration of the estate. Ph. & Trev. 414. P

(10) Executor cannot withhold payment of debts for one year.

An executor is not entitled to withhold payment of debts due from deceased for one year, and execution can issue against the estate of the deceased within that period. 70 P.R. 1871. Q

(11) Death of party before right to sue accrues—Effect on limitation.

As to this, see S. 17 of the Limitation Act, IX of 1908. R

(12) Payment of interest or part-principal—Effect on limitation.

As to this, see S. 20, Limitation Act, IX of 1908. S

(13) Acknowledgment of liability in writing—Effect on limitation.

As to this, see S. 19, Limitation Act, IX of 1908. T

(14) Executor's acknowledgment or admission saves limitation in English Law.

(a) Where there are two or more executors, and one of them gives a written acknowledgment of a debt of their testator, the effect of that is, to bind the testator's estate anew as from the date of the acknowledgment. See *Dick v. Fraser*, 2 Ch. 181. U

(b) An admission of a bond-debt in the answer of the executors of the obligor in a suit to which the obligee is not a party was held sufficient to take the case out of the Statute of Limitation. *Moodie v. Banister*, 4 Drew. 432. Y

(c) After a judgment or order for administration an executor cannot give an acknowledgment to take a debt out of the Statute of Limitations. *Phillips v. Beal*, 32 Beav. 26. W

(15) Hindu executor not competent to revive barred debt by acknowledgment.

(a) The executor of a Hindu Will, like the manager of a joint Hindu family, has no power, by acknowledgment, to revive a debt barred by the law of limitation except against himself. 14 B.L.R. 21 (49). X

(b) It would not be right to apply in India the decisions of the English Courts as to executors in England being at liberty not to avail themselves of the law of limitation; because those decisions probably rest upon the peculiar position of an executor in England, and the rights which he may have from his having been considered originally to be the representative of the Ordinary, and to have entire power over the estate. *Per Couch, C.J.*, in 14 B.L.R. 21 (49). Y

Miscellaneous—(Continued).

(16) Hindu executor not competent to give a new contract for a released debt.

After the estate of the testator has been released by his creditor, an executor has no power by a new contract with the creditor to charge it with liability in respect of the released debt. 4 B. 5. Z

(17) Decree and execution obtained by a creditor against an administrator cannot be set aside in the absence of fraud or collusion.

A decree passed on an award against an administrator at the instance of a creditor of the estate represented by the administrator followed by a sale in execution cannot be set aside in the absence of fraud or collusion. 29 B. 96. A

(18) Executor's right of retainer of legacy for debt owing to estate by beneficiary—English Law.

(a) Where a person who takes a benefit under a will, is indebted to the testator, the executor can in England retain the benefit given by the will in satisfaction of the debt owing. See *Theob.*, 6th Ed., 784-787 and cases therein cited. B

(b) But where at the death of the testator, a debt is owing to him by a person to whom a share of residue is immediately given by the will, but the debt is payable by instalments, the executors are not entitled to retain the share of the beneficiary as against the future instalments of the debt that may become due, but are bound to pay it to the beneficiary without reference to such instalments. *Abrahams v. Abrahams*, 1908, 2 Ch. 69. C

(19) Executor's right of retainer of legacy for debt owing to estate by beneficiary—Indian Law.

(a) An executor is justified in retaining a share of the estate though the debt is barred by limitation. (*Courtenay v. Williams*, Hare 539); and there is no difference between the state of the law in England and the state of the law here. 7 C 644 (647), following 6 C. 340. D

(b) Similarly, the Court is justified in retaining the share of the beneficiary for a debt due from him, although the debt is barred by limitation. 7 C. 644. E

Administration of the estate of a person not domiciled in British India.

(1) No section in the Probate Act corresponding to S. 283 of the Succession Act providing for administration of the estate of a person not domiciled in British India.

The Probate and Administration Act does not contain any section corresponding to S. 283 of the Succession Act which provides that where the domicile of the deceased was not in British India, the application of his moveable property to the payment of his debts is to be regulated by the law of British India. E-1

(2) *Lex fori* governs priorities as regards foreign creditors.

(a) The proper order and priority of distribution of assets is always a matter for the *lex fori*, and the country where the distribution takes place always claims to itself the right to regulate the course of distribution. Per Lord Cairns in *Thorburn v. Steward*, 3 P.C. 478 (573); *R. Kloebe*, 28 Ch. D. 175; and see *I Will Exors.*, 10th Ed., 754, 755. F

(b) In England foreign assets will be administered among the foreign creditors according to the *lex fori*. *Cook v. Gregson*, 2 Dr. 286. G

*Miscellaneous—(Concluded).***(3) All creditors, native and foreign are admitted *pari passu*.**

In administering assets in England, whether the domicile of the deceased was English or foreign, all creditors, English and foreign, are admitted *pari passu*. *Kanareuther v. Geiselsbrecht*, 28 Ch.D. 175, cited in Theob., 6th Ed., 792. H

(4) Foreign creditors who have received part payment must bring it into account.

Foreign creditors who have taken foreign assets in part-payment of their debts, will be admitted to prove against English assets only upon the terms of bringing what they have received into account. *Ibid*; see, also, S. 284 of the Succession Act which has not been incorporated in the Probate Act; see, also, *Gallon v. Honcock*. 2 A. & K. 436. I

[S. 285.]

Debts to be paid
before legacies¹.

**105. Debts of every description must be paid
before any legacy.**

(Notes).**General.****(1) Corresponding Indian Law.**

This section corresponds to S. 285 of the Indian Succession Act, X of 1865. J

(2) Section based on Williams.

The section is based on William's Executors. See II Will. Exors., 10th Ed., 1078. K

1.—“Debts to be paid before legacies.”**(1) No exception in favour of *specific legacies*.**

There is no exception to the rule in the section, in favour of *specific legacies*. II Will. Exors., 10th Ed., 1078. L

(2) Even voluntary bonds have priority over legacies.

Even voluntary bonds must be paid in preference to legacies. (*Ibid.*) M

(3) Every legatee takes his legacy subject to the debts, but he can mortgage the subject of his legacy.

When a person takes a legacy under a will, he takes it subject to the debts due from the estate; but a mortgage by the legatee of the property bequeathed to him is not necessarily invalid even if there are debts due from the deceased. 10 C.W.N. 38=2 C.L.J. 138. N

(4) Trade debts created by a Hindu widow have priority over the reversioners' right.

Trade debts properly incurred by a Hindu widow on the credit of the assets of the business to which she has succeeded as the heiress of her deceased husband, are recoverable after her death out of the assets of the business as against the reversioners who have succeeded thereto, even in the absence of a specific charge. 26 B. 206. O

[S. 286.]

106. If the estate of the deceased is subject to any contingent

Executor or administrator not bound to pay legacies without indemnity¹.

liabilities, an executor or administrator is not bound to pay any legacy without a sufficient indemnity to meet the liabilities whenever they may become due.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 286 of the Indian Succession Act, X of 1865. O-1

1.—“Executor or administrator not bound to pay legacies without indemnity.”

(1) Liability of executor paying legacies with notice of a contingent liability.

An executor with notice of even a contingent or possible liability cannot safely pay legacies or the residue. If he does, he will have to answer the claim of the creditor whose contingent claim has ripened into a certain claim. *Taylor v. Taylor*, 10 Eq., 477. P

(2) Right of such executor as against the legatee.

But, as against the legatee, the executor may claim re-payment of the capital sum which he has paid to the legatee, but without any intermediate income, even though he had notice of the contingent liability at the time of distribution, but not, if at the time the legacy was paid, the contingent liability had ripened into a debt of which he had notice. *Jervis v. Wolferstan*, 18 Eq., 18; *Whitaker v. Kershaw*, 45 Ch. D. 320; cited in II Will. Exors., 10th Ed., 1079. Q

(3) Both under English and Indian Law, the bankruptcy rules as to payment and proof of debts are applicable to the administration of insolvent estates.

As to this, see notes under S. 104, *supra*. R

107. If the assets, after payment of debts, necessary expenses [S. 287.]

Abatement of
general legacies 1.

and specific legacies, are not sufficient to pay all the general legacies in full, the latter shall abate or be diminished in equal proportions;

and, in the absence of any direction to the contrary in the will, the executor has no right to pay one legatee in preference to another, nor to retain any money on account of a legacy to himself or to any person for whom he is a trustee.

Executor not to
pay one legatee in
preference to an-
other 2.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 287 of the Indian Succession Act, X of 1865, but contains in addition the words “in the absence of any direction to the contrary in the will” in the second para. R-1

1.—“Abatement of general legacies.”

(1) General legacy, definition.

As to this, see notes under S. 3, *supra*. S

(2) Specific legacy, definition.

As to this, see S. 3, *supra*. T

(3) Distinction between general and specific legacies.

As to this, see notes under S. 3, *supra*. U

I.—“*Abatement of general legacies*”—(Concluded).(4) On a deficiency, *general legacies abate*.

In case of deficiency of assets, general legacies are subject to abatement.
I Will. Exors., 10th Ed., 1087. Y

(5) They abate together and proportionally.

All general legacies abate together and proportionally, in case of a deficiency of assets. I Will. Exors., 10th Ed., 1087, 1093. W

(6) First exception to the rule as to abatement of *general legacies*.

(a) Where there is any valuable consideration for any legacy, e.g., debt due to the legatee, or dower due to a widow, such legacy is entitled to a preferential payment over other *general legacies* in the nature of bounties, provided the right or interest forming the consideration for such legacy is subsisting at the testator's death. *Blower v. Morrett*, 2 Ves. Sen. 422; *Heath v. Dendy*, 1 Russ. 543; *Davies v. Bush*, 1 Younge, 341; cited in I Will. Exors., 10 Ed., 1094. X

(b) But the principle by which a legacy given in satisfaction of dower is entitled to priority and does not abate is inapplicable to the case of a legacy given by a father to the trustees of his daughter's marriage settlement in satisfaction of his covenant to pay them a smaller sum, as such a legacy is a mere bounty. *Wedmore v. Wedmore*, 1907, 2 Ch. 277. Y

(7) Second exception to the rule.

If by express words or fair construction of the will, the intent of the testator is clearly manifest to give one general legatee a priority to the others that intention must be carried into effect. *Lewen v. Lewen*, 2 Ves. Sen. 415; *Re Hardy*, 17 Ch. D. 798; *Marsh v. Evans*, 1 P. Wms. 668; *Att.-Gen. v. Robbons*, 2 P. Wms. 23; cited in I Will. Exors., 10th Ed., 1097, 1098. Z

(8) Right of executor to apply to have all legatees joined in a suit by a legatee for his legacy.

As to this, see 26 B. 301, cited under S. 55, *supra*. A

(9) A debt forgiven is a *specific legacy* not liable to abatement.

Where a testator in his will forgives the debts due to him by his sons, that amounts to specific legacies not liable to abatement in the event of insufficiency of assets. *Wedmore v. Wedmore*, 1907, 2 Ch. 277. B

(10) When *specific legacies* are liable to abate.

(a) As long as any of the assets, not specifically bequeathed remain, such as are specifically bequeathed are not to be applied in payment of debts, although to the complete disappointment of the general legacies. II Will. Exors., 10 Ed., 1100. C

(b) But when the assets, not specifically bequeathed, are insufficient to pay all the debts, the *specific legacies* must abate in proportion to their values, *Ibid.*, and see cases therein cited. D

(c) See also S. 110, *infra*. E

(11) Residuary legatee not entitled to call upon *general legacies* to abate.

As to this, see notes under S. 145, *infra*. F

(12) “*Assets*,” meaning.

As to this, see notes under S. 62, *supra*. G

2.—“*Executor not to pay one legatee in preference to another.*”

Executor cannot prefer his own legacy.

An executor has no preference to his own legacy ; in case of deficiency it must abate in the same way as other legacies. *Duncan v. Watts*, 16 Beav. 204 ; *Re White*, 1898, 2 Ch. 217 ; see, also, 1 Will. Exors., 10th Ed., 1088. H

108. Where there is a specific legacy, and the assets are sufficient for the payment of debts and necessary expenses, the thing specified must be delivered to the legatee without any abatement. [S. 288.]

Non-abatement of specific legacy¹ when assets sufficient to pay debts.

expenses, the thing specified must be delivered to the legatee without any abatement.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 288 of the Indian Succession Act, X of 1865. I

1.—“*Non-abatement of specific legacy.*”

(1) Specific legacy, definition.

As to this, see S. 3, *supra*. J

(2) Assets, meaning.

As to this, see notes under S. 62, *supra*. K

(3) When *specific* legacies are liable to abate.

As to this, see notes under S. 107, *supra* and S. 110, *infra*. L

(4) Executor's right of retainer of legacy for debt owing to estate by beneficiary — English and Indian Law.

As to this, see notes under S. 104, *supra*. M

109. Where there is a demonstrative legacy, and the assets are sufficient for the payment of debts and necessary expenses, the legatee has a preferential claim for payment of his legacy out of the fund from which the legacy is directed to be paid until such fund is exhausted, and if, after the fund is exhausted, part of the legacy still remains unpaid, he is entitled to rank for the remainder against the general assets as for a legacy of the amount of such unpaid remainder. [S. 289.]

Right under demonstrative legacy when assets sufficient to pay debts and necessary expenses¹.

sufficient for the payment of debts and necessary expenses, the legatee has a preferential claim for payment of his legacy out of the fund from which the legacy is directed to be paid until such fund is exhausted, and if, after the fund is exhausted, part of the legacy still remains unpaid, he is entitled to rank for the remainder against the general assets as for a legacy of the amount of such unpaid remainder.

(Notes).

General.

Corresponding Indian Law

This section corresponds to S. 289 of the Indian Succession Act, X of 1865. N

1.—“*Right under demonstrative legacy when assets sufficient to pay debts and necessary expenses.*”

(1) Demonstrative legacy, defined.

As to this, see S. 3, *supra*. O

(2) *Demonstrative* legacy distinguished from *specific* and *general* legacies.

As to this, see notes under S. 3, *supra*. P

1.—“Right under demonstrative legacy when assets sufficient to pay debts and necessary expenses”—(Concluded).**(3) “Assets,” meaning.**As to this, see notes under S. 62, *supra*.

Q

(4) Demonstrative legacy will be paid out of general assets on failure of fund.

(a) Where a testator directed that certain monthly allowances should be paid to his widows out of the interest of certain Government Promissory Notes to be purchased by his trustees, *held* that if the particular sources of income, out of which the allowances were to be paid, should prove insufficient, the rest of the moveable property, or the income derivable from it, as well as the rents of the immoveable property should contribute. 9 B. 491. R

(b) Apart from the Hindu Wills Act or the Succession Act, as a principle of general application, on the failure of the particular fund *demonstrative* legacies will be paid out of the general assets. 19 C. 444 = 19 I. A. 88. S

(5) But not where there are directions to the contrary in the will.

The rule that, in case of demonstrative legacies, the legatee is entitled to resort to the general assets on failure of the source intended, will not apply where there are directions to the contrary by the testator, *e.g.*, that the legacies shall not be paid out of the “principal.” (corpus). 29 M. 155. T

(6) Demonstrative legacy does not abate with general legacies.

Demonstrative legacies do not abate with *general* legacies. 1 Will. Exors., 10th Ed., 1099, 1100, and see cases therein cited. U

(7) Where a demonstrative legacy will abate.

A *demonstrative* legacy is liable to abate when it becomes a general legacy by reason of the failure of the fund out of which it is payable. *Per* Kindersley V.C. in *Mullins v. Smith*, 1 Dr. & Sm. 210. Y

(8) Demonstrative legacy must abate with specific legacy.

A *demonstrative* legacy must abate with *specific* legacies. II Will. Exors., 10th Ed., 1100, *citing* *Roberts v. Pecoek*, 4 Ves. 160. W

[S. 290.]

Rateable abatement of specific legacies L

110. If the assets are not sufficient to answer the debts and the specific legacies, an abatement shall be made from the latter rateably in proportion to their respective amounts.

Illustration.

A has bequeathed to B a diamond ring, valued at 500 rupees, and to C a horse, valued at 1,000 rupees. It is found necessary to sell all the effects of the testator, and his assets, after payment of debts, are only 1,000 rupees. Of this sum rupees 333-5-4 are to be paid to B, and rupees 666-10-8 to C.

(Notes).**General.****Corresponding Indian Law**

This section corresponds to S. 290 of the Indian Succession Act, X of 1865. X

1.—“Rateable abatement of specific legacies.”

(1) Specific legacy, defined.

As to this, see S. 3, *supra*.

Y

(2) Assets, meaning.

As to this, see notes under S. 62, *supra*.

Z

(3) When specific legacies will abate.

(a) *Specific* legacies abate only when the assets not specifically bequeathed, are insufficient to pay all the debts. I Will. Exors., 10th Ed., 1100, and see cases therein cited.

A

(b) See also notes under S. 107, *supra*.

B

(4) Specific legacies abate in proportion to their values.

When the assets not specifically bequeathed are insufficient to pay all debts, then the *specific* legatees must abate in proportion to the value of their individual legacies. *Sleech v. Torrington*, 3 Ves. 561.

C

111. For the purpose of abatement, a legacy for life, a sum [S. 291.]

Legacies treated as general for purpose of abatement¹.

appropriated by the will to produce an annuity, and the value of an annuity when no sum has been appropriated to produce it, shall be treated as general legacies.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 291 of the Indian Succession Act, X of 1865. D

1.—“Legacies treated as general for purpose of abatement.”

(1) Annuity, defined.

An annuity is a yearly payment of a certain sum of money granted to another in fee, for life, or for years, charging the person of the grantor only. Co. Litt. 144, cited in I Will. Exors., 10th Ed., 622.

E

(2) An annuity is a general legacy.

The term “legacies” *prima facie* comprehends annuities; and “legatee” includes an annuitant. *Sibley v. Perry*, 7 Ves. 522; *Bromley v. Wright*, 7 Ha. 334; *Heath v. Weston*, 3 D.M.G. 601; cited in Hawkins 298. F

(3) Annuities abate with general legacies.

An annuity charged on the personal estate is a general legacy. Therefore, as between annuitants and legatees, there is no priority where there is a deficient estate, but both must abate equally. II Will. Exors., 10th Ed., 1096; see, also, *Innes v. Mitchell*, 1 Phil. Ch. Cas. 716.

G

(4) Commencement of annuity does not affect the above rule.

The above rule will apply whether an annuity is to commence immediately on the death of the testator, or at a future period. *Innes v. Mitchell*, 1 Phil. Ch. Cas. 716, cited in *ibid*.

H

(5) Annuities abate among themselves.

Annuities must abate also among themselves. *Innes v. Mitchell*, 2 Phill Ch. C. 346.

I

1.—“Legacies treated as general for purpose of abatement”—(Concluded).

(6) On administration by Court, annuitant to receive the value subject to abatement.

Where the deficient estate is being administered under an order of the Court, the annuity ought to be valued, and the annuitant will be entitled at once to the amount of the valuation subject to an abatement in proportion to the abatement of the pecuniary legacies, notwithstanding that the annuity itself was payable for life or until the annuitant should do or suffer some act whereby the annuity or any part thereof, if belonging to him absolutely, would vest in some other person. *Re Nicholson's Estate*, 11 Eq. 177; *Wroughton v. Colquhoun*, 1 De. G. & Sm. 357; *Re Sinclair*, 1897, 1 Ch. 921; cited in II Will. Exors., 10th Ed., 1097. J

(7) English practice for valuing annuity.

- (a) In estimating the value of annuities for purposes of abatement, their value is to be taken at the time, when the estimate is made. *Todd v. Bielby*, 27 Beav. 353; *Metcalf v. Blencowe*, 1903, 2 Ch. 424. K
- (b) Thus, if all the annuitants are living at the period of division, the value must be ascertained at the death of the testator. K-1
- (c) If they be all dead, the value must be taken to be the respective amount of arrears. K-2
- (d) If some be dead and others living, the value, as to the former, will be taken at the amount of their arrears, and as to the latter at the amount of their arrears added to the calculated value of the future payments. *Todd v. Bielby*, 27 Beav. 353. L
- (e) In the case of a reversionary annuity which has come into possession, the value must be taken to be the present value of the annuity added to the amount of the arrears due since it came into possession. *Potts v. Smith*, 8 Eq. 683. M

(8) Annuities have priority over residuary gift.

- (a) As a general rule, the residuary legatee is entitled to nothing, till all the particular legacies given by the will are satisfied in full. *Theob.*, 6th Ed., 811; see, also, II Will. Exors., 10th Ed., 1088. N
- (b) So, as a rule, a residuary legatee is entitled to nothing before an annuity is paid in full; the annuity takes precedence over the residuary gift. *Arnold v. Arnold*, 2 M. & K. 374; *Anderson v. Anderson*, 33 Beav. 223; *Farmer v. Mills*, 4 Russ. 86. O
- (c) The general rule is, that if there be a clear gift of a life-interest and of a reversion, and the estate proves insufficient, each party, the tenant-for-life and the reversioner, must bear the loss in proportion to his interest; but that if there is a gift of an annuity and a residuary gift, the annuity takes precedence, and the whole loss falls on the residuary estate. *Per Turner, L.J. in Croly v. Weld*, 3 De G. M. & G. 995. P

(9) Except where there is a contrary intention in the will.

But the provisions of the will as to the payment of the annuity may be such as to show an intention, on the part of the testator, that the annuity shall only come out of the income of the fund or estate, and not out of the corpus or capital. II Will. Exors., 10th Ed., 1088. Q

CHAPTER VIII.

OF THE EXECUTOR'S ASSENT TO A LEGACY.

N.B.—The provisions in Chap. VIII as to an executor apply also to an administrator with the will annexed. See S. 148, *infra*.

Assent necessary
to complete legatee's
title I.

112. The assent of the executor is necessary to complete a legatee's title to his legacy. [S. 292.]

Illustrations.

(a) A by his will bequeaths to B his Government paper, which is in deposit with the Bank of Bengal. The Bank has no authority to deliver the securities, nor B a right to take possession of them, without the assent of the executor.

(b) A by his will has bequeathed to C his house in Calcutta in the tenancy of B. C is not entitled to receive the rents without the assent of the executor.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 292 of the Indian Succession Act, X of 1865. R

1.—“Assent necessary to complete legatee's title.”

(1) Reason for the requirement of executor's assent.

The reason for the requirement of the executor's assent is that an executor is responsible to the creditors for the satisfaction of their demands to the extent of the whole estate. II Will. Exors., 10 Ed., 1101. S

(2) Without such assent, the legatee cannot take possession of the legacy.

The legatee has no authority to take possession of his legacy without the executor's assent, although the testator by his will, expressly direct that he shall do so. *Ibid.* T

(3) Before such assent, the legatee has only an inchoate right.

But, before such assent, the legatee has an *inchoate right* to the legacy which is transmissible to his personal representatives in case of his death before payment. *Ibid.* U

(4) Such assent necessary for a legacy for giving a debt.

A legacy for giving a debt due from a debtor also requires the assent of the executor. *Ibid.* Y

(5) Such assent necessary even for a devise of realty in English Law.

In England, since the Land Transfer Act, 1897, assent of executor is required to a devise of real estate. See II Will. Exors., 10th Ed., 1103. W

(6) Executor refusing assent without cause may be compelled to give it.

If an executor refuse his assent without cause, he may be compelled to give it by the Court. II Will. Exors., 10th Ed., 1103. X

(7) By whom the assent can be given.

(i) By a person appointed executor, before he proves the will; or even though he dies before proving the will. I Will. Exors., 10th Ed., 220; II Will. Exors., 1107. Y

I.—“Assent necessary to complete legatee's title”.—(Concluded).

(ii) By one of several executors. I Will. Exors., 10th Ed., 718; II Will. Exors., 1107. Z

(iii) By an administrator *durante minoretate*. I Will. Exors., 10th Ed. 398; II Will. Exors., 1107. A

(8) Assent may be as to part of legacy.

There may be assent as to part only of a legacy. *Per Parke, B. in Elliot v. Elliot*, 9 M. & W. 28. B

(9) What the plaintiff must show in a suit for legacy.

In a suit for a legacy, the plaintiff must show either that the executor is in possession of sufficient assets to pay the legacy, or that he has assented to the legacy being paid to the plaintiff. 17 C. 387 (389). C

(10) An executor who has not assented cannot make a reference to the Court under the Trusts Act.

An executor, who has not become a trustee by assenting to the legacies, cannot make a reference to the Court under S. 34 of the Trusts Act, 1882. His remedy, if any, is to file an administration suit. 33 B. 429=11 Bom. L.R. 495=3 Ind. Cas. 164. D

Period of limitation for certain suits.

(1) Suit for a legacy or for a share of residue.

The limitation for a suit for a legacy or for a share of a residue bequeathed by a testator, or for a distributive share of the property of an intestate is 12 years from the time when the legacy or share becomes payable or deliverable. See Art. 123, Indian Limitation Act, IX of 1908; see, also, 9 C. 79. E

(2) Suit for possession of immoveable property by a devisee.

The limitation for a suit for possession of immoveable property by a devisee is 12 years from the time when his estate falls into possession. See, Art. 140, Indian Limitation Act, IX of 1908. F

(3) Suit to recover legacy from executor personally.

A suit by a legatee to recover his legacy from the executor personally on the ground of waste of assets is governed by Art. 123 and not by Art. 43. 19 M. 425 (432). G

(4) Suit for legacy with ancillary claim for administration.

Where the prayer for the administration of an estate is only ancillary to the plaintiff's claim for a legacy, the Article applicable is 123 and not 120. 12 M.L.J. 183=25 M. 361. H

(5) Suit to recover property declaring the bequest void.

The limitation for a suit to recover moveable and immoveable properties on declaration of the bequest being void and inoperative is governed by Arts. 120 and 141 and not Art. 144. 23 B. 725; 14 B. 482. I

(6) Suit for construction of will.

A suit for construction of a will is governed by Art. 120. 20 C. 906. J

(7) Suit to set aside a will.

A suit to set aside a will is not governed by Art. 91. 23 C. 1 (10)=22 I.A. 171; 4 O.C. 6. K

(8) Suit for administration of estate after death of testator's widow.

For the limitation of a——, see 23 B. 725. L

113. The assent of the executor to a specific bequest shall be sufficient to divest his interest as executor therein, and to transfer the subject of the bequest to the legatee, unless the nature or the circumstances of the property require that it shall be transferred in a particular way.

[S. 293.]

Effect of executor's assent to specific legacy ¹.

Nature of assent ². This assent may be verbal, and it may be either express or implied from the conduct of the executor.

(a) A horse is bequeathed. The executor requests the legatee to dispose of it, or a third party proposes to purchase the horse from the executor, and he directs him to apply to the legatee. Assent to the legacy is implied.

(b) The interest of a fund is directed by the will to be applied for the maintenance of the legatee during his minority. The executor commences so to apply it. This is an assent to the whole of the bequest.

(c) A bequest is made of a fund to A, and after him to B. The executor pays the interest of the fund to A. This is an implied assent to the bequest to B.

(d) Executors die after paying all the debts of the testator, but before satisfaction of specific legacies. Assent to the legacies may be presumed.

(e) A person to whom a specific article has been bequeathed takes possession of it and retains it without any objection on the part of the executor. His assent may be presumed.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 293 of the Indian Succession Act, X of 1865. **M**

1.—“ *Effect of executor's assent to specific legacy.* ”

Right to sue for subject of legacy vests in legatee after assent of executor.

When specific shares bequeathed to A were duly transferred to A by the executors after probate and assent, and subsequently a codicil was discovered revoking the bequest to A and giving the shares to B, but with the same executors, and the original probate was revoked, and a fresh probate including the codicil was granted to the same executors, *held*, the specific legacy having been in fact assented to, the legal title with the right to sue for the legacy at common law vested in B, and he could therefore recover both the shares and the mesne income from A. *West v. Roberts*, 1909, 2 Ch. 180. **N**

2.—“*Nature of assent.*”

(1) No specific form necessary for assent.

No specific form is prescribed for the assent. It may be either express or implied; implied from direct expressions or particular acts, provided such expressions or acts are unambiguous. II Will. Exors., 10th Ed. 1105. O

(2) Illustration (a).

Illustration (a) is taken from Wentworth's Office of Executor, 14th Ed., 414, cited in II Will. Exors., 10th Ed. 1104.

(3) Illustration (b).

Illustration (b) is taken from the English case of *Paramour v. Yardley*, Plowd., 539. Q

(4) Illustration (c).

Illustration (c) is taken from the English case of *Stevenson v. Mayor of Liverpool*, 10 Q.B. 81; the reason being that the particular estate and the remainder constitute but one estate. See II Will. Exors., 10th Ed. 1105. R

(5) Assent to bequest of one is assent to bequest of same property to another.

Where more than one person takes under a bequest of specific property, an assent to the bequest to one will, generally speaking, be an assent to the others. *Stevenson v. Liverpool*, 10 Q.B. 81. See Illus. (c). S

(6) The assent may be as to part only.

Where there is a bequest of a number of articles, as stock-in-trade, or plate, the executor may properly withhold his assent as to part. *Elliott v. Elliott*, 9 M. and W. 23. T

(7) Illustration (d).

Illustration (d) is taken from the English case of *Cray v. Willis*, 2 P. Wms. 531, 532, the reason being that the executors are taken to have acted in conformity with their duty. See II Will. Exors., 10th Ed. 1106. U

(8) Illustration (e).

Illustration (e) is taken from Mathews on Presumptions, 267, cited in II Will. Exors., 10th Ed. 1106; see, also, *Cole v. Miles*, 10 Hare 179; *Richardson v. Gifford*, 1 A. and E. 52. Y

(9) When retaining by legatee will amount to implied assent of executor.

For the retaining by the legatee to amount to an implied assent of the executor it must be for some considerable time and with the executor's knowledge; *Cole v. Miles*, 10 Hare 179. See Illus. (e). W

(10) Assent of executor, a question of fact.

In England, as in India under S. 119, the assent of an executor is a question of fact. *Mason v. Farnell*, 12 M. and W. 674: cited in Hend. 3rd Ed. 353. X

114. The assent of an executor to a legacy may be conditional, [S. 294.]
 Conditional and if the condition be one which he has a right
 assent¹. to enforce, and it is not performed, there is no
 assent.

Illustrations.

(a) A bequeaths to B his lands of Sultanpur, which at the date of the will, and at the death of A, were subject to a mortgage for 10,000 rupees. The executor assents to the bequest on condition that B shall within a limited time pay the amount due on the mortgage at the testator's death. The amount is not paid. There is no assent.

(b) The executor assents to a bequest on condition that the legatee shall pay him a sum of money. The payment is not made. The assent is nevertheless valid.

(Notes).

General.

(1) Corresponding Indian Law.

This section corresponds to S. 294 of the Indian Succession Act, X of 1865. Y

(2) Section based on Williams.

This section is based on William's Executors. See II Will., Exors., 10th Ed. 1107. Z

1.—“Conditional assent.”

Where condition is one which executor has no right to enforce the assent is absolute.

If the condition is one which the executor had no authority to impose, the assent is absolute whether the condition is precedent or subsequent.

Ibid., citing *Elliott v. Elliot*, 9 M. and W. 28. See Illus. (b). A

115. When the executor is a legatee, his assent to his own [S. 295.]
 Assent of executor legacy is necessary to complete his title to it, in the
 to his own legacy¹. same way as it is required when the bequest is to
 another person, and his assent may in like manner be express or
 implied.

Assent shall be implied if in his manner of administering the
 property he does any act which is referable to his
 Implied assent². character of legatee and is not referable to his
 character of executor.

Illustration.

An executor takes the rent of a house or the interest of Government securities bequeathed to him, and applies it to his own use. This is assent.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 295 of the Indian Succession Act, X of 1865. B

1.—“Assent of executor to his own legacy.”

(1) Assent necessary even to executor's own legacy.

Assent of executor is necessary even to his own legacy. II Will. Exors., 10th Ed. 1109. C

(2) Assent ineffectual if executor renounces probate.

If an executor legatee renounces probate, his assent to his own legacy is ineffectual; nor can he in such a case take the thing bequeathed without the permission of the administrator with the will annexed. *Broker v. Charter*, Cro-Ellis. 92, cited in II Will., Exors., 10th Ed. 1114. D

(3) Assent of one of several executors to his own legacy how far effectual.

(a) If a legacy is given to one of several executors, he may take it of his own assent, without the others, his single assent being sufficient to vest the complete title in him. II Will. Exors., 10th Ed. 1107, 1114. E

(b) And if the subject be entire and given to all the executors, the assent of any one of them to his own proportion is sufficient. *Ibid.*, citing *Townson v. Tickell*, 3 B. & A. 31, 40. F

2.—“Implied assent.”

(1) Executor's assent to his own legacy may be express or implied.

The assent of an executor to his own legacy may be express or may be implied from his language or conduct. II Will. Exors., 10th Ed., 1109. G

(2) When the assent will be implied.

(a) If an executor, in his manner of administering the property, does any act which shows he has assented to the legacy, that shall be taken as evidence of his assent; but if his acts are referable to his character of executor, they are not evidence of assent to the legacy. *Per Gibbs, C.J.*, in *Doe v. Sturges*, 7 Taunt 223. H

(b) To constitute an implied assent, the act relied upon should not be equally applicable to the title of legatee as to the character of executor. *Ibid.* I

(c) Thus, if the executor sells or grants a lease of a house bequeathed to him, this cannot be construed an assent, because the act is consistent with his power and character as executor. *Stokes*, 185. J

(d) For examples of assent implied from the conduct of the executor, see II Will., Exors., 10th Ed. 1109, 1110. K

Miscellaneous.

(1) Legatee named executor cannot take unless he shows intention to act as executor.

If a legacy is bequeathed to a person who is named an executor of the will, he shall not take the legacy unless he proves the will or otherwise manifests an intention to act as executor. (S. 128 of the Succession Act, X of 1865). L

(2) Proof of will, not absolutely necessary.

As a general rule, there must be unequivocal evidence of an intention to act, and that evidence is best given by the probate of the will. But, it is not absolutely necessary to prove a will in order to entitle a person to a legacy as executor. *Per Kindersley, V.C.*, in *Lewis v. Mathews*, 8 Eq. 277 (281); see, also, *Harrison v. Rowley*, 4 Ves. 212. M

Miscellaneous—(Concluded).

(3) What is a sufficient assumption of the office to satisfy the condition.

(a) If the legatee prove the will, with an intention to act under it, that is enough; or even if he unequivocally manifests an intention to act in the executorship, as by giving directions about the funeral, etc., even though he is prevented by death from further entering upon the office. *Harrison v. Rowley*, 4 Ves. 212. **N**

(b) Thus, where an executor who was given a legacy for his trouble, being in Australia at the death of the testator in England, sent home a general power-of-attorney under which another person administered the estate, and the executor then died without proving the will, *held*, he had sufficiently manifested his intention to act so as to entitle his representatives to the legacy. *Lewis v. Mathews*, 8 Eq. 277. **O**

(c) Where a testator gave a legacy to a person whom he appointed executor and the latter manifested an intention to act by making arrangements for the funerals, etc., and was always ready and willing to act, but could not act on account of disagreement with his co-executor, *held*, he was entitled to the legacy. 15 C. 88. **P**

(d) If an executor proves and *bona fide* acts as such, at any time before the real business of administering the estate is concluded, that is enough to entitle him to the legacy. *Angermann v. Ford*, 29 Beav. 349. **Q**

(e) But, if the conduct of the executor is such as to violate the confidence reposed in him by the executor, the mere act of proving the will cannot entitle him to the legacy meant for him. *Harford v. Browning*, 1 Cox. 302. **R**

(4) Even a defaulting trustee of a will is entitled to his legacy.

Where a trustee of a will misappropriated part of the trust funds and in his bankruptcy a composition was approved by the Court under which a dividend was paid to the new trustees of the will, *held*, the defaulting trustee was nevertheless entitled to receive the share which was bequeathed to him beneficially by the will. *White v. Sewell*, 1909, 1 Ch. 806. **S**

(5) Where the testator had expressed his intention to give a legacy to an executor, he is entitled to take it.

The principle laid down in *Strong v. Bird*, 18 Eq. 315—that where a testator has expressed in his life-time an intention to give personal estate belonging to him to one who becomes his executor, the intention to give continuing, the donee is entitled to hold the property for his own benefit—is not confined to the release of a debt; and it is immaterial whether the donee is the only executor or one of several. *Stewart v. Mc. Daughlin*, 1908, 2 Ch. 251. **T**

(6) In India, executor need not shed his character as executor before appearing as legatee.

An executor is not obliged in this country, as in England, to shed his character of executor before he can appear in the new character of legatee. 13 W.R. 69. **U**

(7) Executor's legacy has no priority.

As to this, see notes under S. 107, *supra*. **V**

[S. 296.] Effect of executor's
assent.

116. The assent of the executor to a legacy gives effect to it from the death of the testator.

Illustrations.

(a) A legatee sells his legacy before it is assented to by the executor. The executor's subsequent assent operates for the benefit of the purchaser, and completes his title to the legacy.

(b) A bequeaths 1,000 rupees to B with interest from his death. The executor does not assent to this legacy until the expiration of a year from A's death. B is entitled to interest from the death of A.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 296 of the Indian Succession Act, X of 1865. W

I.—“Effect of executor's assent.”

- (1) It is the duty of executor to assent as soon as all debts and expenses have been paid.

It is the duty of executors to assent as soon as all the debts and expenses attending the administration have been satisfied, and there is a sufficient residue to pay all the legacies. Stokes, 185. X

- (2) Effect of assent.

After an assent by the executor to a specific legacy, the interest in the chattel bequeathed vests in the legatee, so that he may bring an action to recover it, even against the executor himself. II Will. Exors., 10th Ed. 1107. Y

- (3) Assent relates to death of testator.

The assent of an executor relates to the time of the testator's death and so it will by relation confirm an intermediate grant by the legatee of his legacy. II Will. Exors., 10th Ed., 1108. Z

- (4) Whether executor can retract assent and when.

(a) As a general rule, an assent once given cannot be retracted by the executor; and notwithstanding a subsequent dissent, a specific legatee has a right to take the legacy and has a lien on the assets for that specific part, and may follow them. II Will. Exors., 10th Ed., 1108, citing *Mead v. Orerry*, 3 Atk. 238. A

(b) But, if the assent has not been completed by payment, in the case of a general legacy, or possession, in that of a specific one, and its recall is not attended with injury to a third person, as to a *bona fide* purchaser from the legatee on the faith of such assent, the executor, may, under particular circumstances, retract it, as where unknown debts are unexpectedly claimed, thereby causing a deficiency of assets. *Ibid.*, citing *Roper on Legacies*, 3rd Ed. 743. B

Executor when to
deliver legacies ?

117. An executor is not bound to pay or [S. 297.]
deliver any legacy until the expiration of one year
from the testator's death.

Illustration.

A by his will directs his legacies to be paid within six months after his death. The executor is not bound to pay them before the expiration of a year.

(Notes).

General.

(1) Corresponding Indian Law.

This section corresponds to S. 297 of the Indian Succession Act, X of 1865. C

(2) Doubtful whether the rule in the section applies to every will in India.

The provisions of this section are not to be imported into the terms of every will in this country. *Per Mahmood, J.* in 6 A. 583, 615. D

I.—“*Executor when to deliver legacies.*”

(1) Object of the rule in the section.

One year is given by the law to liquidate the estate, on the expiration of which, the moment the estate is liquidated, a legatee can insist upon being paid; and the moment the debts and legacies have been paid, the residuary becomes entitled to the residue; and if there are more than one residuary, the residue then becomes divisible, 7 Bom. L.R. 755 (758). E

(2) Within the year the executor cannot be compelled to pay any legacy.

Within the period of one year from the testator's death, the executor cannot be compelled to pay a legacy, even in a case where the testator directs it to be paid within six months after his death. *Venson v. Maude*, 6 Madd. 15, cited in II Will. Exors., 10th Ed. 1115. F

(3) The allowance of the year is only for the convenience of the executor.

The allowance of a year to executors is merely for convenience, in order that the debts of the testator may be ascertained, and the executors made acquainted with the amount of assets so as to be able to make a proper distribution of them. *Garthshore v. Chalie*, 10 Ves. 13, cited in *Ibid.* G

(4) So an executor is competent to pay legacies within the year.

So, if the state of the testator's assets be such as to enable the executors to pay legacies at an earlier period, they have authority to do so. *Per Lord Redesdale* in *Pearson v. Pearson*, 1 Scho. & Lefr. 12. cited in *Ibid.*; see, also, the remarks of Lord Eldon *Angwinstein v. Martin*, 1 Turn. and R. 241. H

CHAPTER IX.

OF THE PAYMENT AND APPORTIONMENT OF ANNUITIES.

N.B.—The provisions in Chap. IX as to an executor apply also to an administrator, with the will annexed. See S. 148, *infra*.

- [S. 298.] **118.** Where an annuity is given by the will, and no time is fixed for its commencement, it shall commence from the testator's death, and the first payment shall be made at the expiration of a year next after that event.

Commencement of annuity when no time fixed by will¹.

(Notes).

General.

(1) Corresponding Indian Law.

This section corresponds to S. 298 of the Indian Succession Act, X of 1865. I

(2) Section is copied from Williams.

S. 118 is copied directly from Williams. See II Will. Exors., 10th Ed. 1116 citing Lord Eldon in *Gibson v. Bott*, 7 Ves. 96, 97 and in *Farns. v. Young*, 9 Ves. 553; *Stamper v. Pickering*, 9 Sim. 176. J

1.—“Commencement of annuity when no time fixed by will.”

Annuity, definition.

As to this, see notes under S 111, *supra*. J-1

- [S. 299.] **119.** Where there is a direction that the annuity shall be paid quarterly or monthly, the first payment shall be due at the end of the first quarter or first month, as the case may be, after the testator's death, and shall, if the executor think fit, be paid when due; but the executor shall not be bound to pay it till the end of the year.

When annuity, to be paid quarterly or monthly, first falls due.

(Notes).

General.

(1) Corresponding Indian Law.

This section corresponds to S. 299 of the Indian Succession Act, X of 1865. K

(2) Section is copied from Williams.

S. 119 is copied directly from Williams. See II Will. Exors., 10th Ed. 1117, citing *Storer v. Prestage*, 3 Madd. 167, *Houghton v. Franklin*, 1 Sim. and Stu. 390. L

- [S. 300.] **120.** Where there is a direction that the first payment of an annuity shall be made within one month or any other division of time from the death of the testator, or on a day certain, the successive payments are to be made on the anniversary of the earliest day on which the will authorizes the first payment to be made;

Date of successive payments when first payment directed to be made within given time, or on day certain¹.

App or tionment
where annuitant dies
between times of
payment.

and, if the annuitant dies in the interval between the times of payment, an apportioned share of the annuity shall be paid to his representative.

(Notes).

General.

(1) Corresponding Indian Law.

This section corresponds to S. 300 of the Indian Succession Act, X of 1865. **M**

(2) Section is based on Williams.

S. 120 is based on Williams. See II Will. Exors., 10th Ed. 1117, citing *Irvin v. Ironmonger*, 2 Russ. & M. 531. **N**

(3) Departure from English Law.

In this section the English Law has been slightly departed from. There, where a testator directs the first payment of an annuity to be made within one month of his death, although the first year's payment is due at the appointed time, the payment for the second year does not become due till the end of that year. See *Irvin v. Ironmonger*, 2 Russ. & M. 531. **O**

1.—“ Dates of successive payments when first payment directed to be made within given time, or on day certain. ”

Sum directed to purchase annuity, from what period payable.

It is doubtful whether a sum of money, directed to be placed out, to produce an annuity is to be considered as a legacy payable at the end of a year, or as an annuity payable from the death. II Will. Exors., 10th Ed. 1117. **P**

CHAPTER X.

OF THE INVESTMENT OF FUNDS TO PROVIDE FOR LEGACIES.

N.B.—The provisions in Chap. X as to an executor apply also to an administrator with the will annexed. See S. 148, *infra*.

121. Where a legacy, not being a specific legacy, is given for [S. 301.]
Investment of sum bequeathed where legacy, not specific, given for life¹. life, the sum bequeathed shall at the end of the year be invested in such securities as the High Court may, by any general rule to be made from time to time, authorize or direct, and the proceeds thereof shall be paid to the legatee as the same shall accrue due.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 301 of the Indian Succession Act, X of 1865. **Q**

1. —“ Investment of sum bequeathed where legacy, not specific, given for life. ”**(1) Specific legacy, definition.**As to this, see S. 3, *supra*.**R****(2) Distinction between *general* and *specific* legacies.**As to this, see notes under S. 3, *supra*.**S****(3) Property given to one for life with remainder to another must be enjoyed in *specie*.**

(a) In English law, where a testator bequeaths personal property *specifically* to one for life, with remainder over afterwards, the property must be enjoyed in *specie*. *Pickering v. Pickering*, 4 M. & Cr. 299. **T**

(b) If a person gives certain property specifically to one for life with remainder over afterwards, then although there is a danger that one object of his bounty will be defeated by the tenancy for life lasting as long as the property endures, yet there is a manifestation of intention which the Court cannot overlook. *Per Lord Cottenham in Pickering v. Pickering*, 4 M. & Cr. 289. **U**

(4) Sale and investment of proceeds of property bequeathed to two or more persons in succession.

(a) Where property comprised in a bequest to two more persons in succession is not specifically bequeathed, it shall, in the absence of any direction to the contrary be sold, and the proceeds of the sale shall be invested in such securities as the High Court may, by any general rule to be made from time to time, authorize or direct, and the fund thus constituted shall be enjoyed by the successive legatees according to the terms of the will. (S. 135 of the Succession Act, X of 1865). **Y**

(b) For the corresponding rule in English Law, see *Howe v. Lord Dartmouth*, 7 Ves. 137, cited in I Will. Exors., 10th Ed. 926. **W**

(5) Authorised investments, what are.As to this, see notes under S. 147, *infra*.**X****(6) Duties and powers of trustees with regard to investments.**

As to——, see

i. S. 14, Official Trustees Act, XVII of 1864;

and ii. S. 20, Indian Trusts Act, II of 1882. **Y**

[S. 302.]

122. Where a general legacy is given to be paid at a future time, the executor shall invest a sum sufficient to meet it in securities of the kind mentioned in the last preceding section.

Investment of
general legacy, to be
paid at future time 1.

Intermediate in-
terest.

The intermediate interest shall form part of the residue of the testator's estate.

(Notes).**General.****Corresponding Indian Law.**

This section corresponds to S. 302 of the Indian Succession Act, X of 1865. **Z**

1.—“Investment of general legacy, to be paid at future time.”

(1) General legacy, defined.

As to this, see notes under S. 3, *supra*.

A

(2) Distinction between *general* and *specific* legacies.

See *Ibid*.

B

(3) Legatee of legacy payable *in futuro* can apply to the Court to have a sum set apart to meet his legacy.

In the case of legacies payable *in futuro*, the legatee, though not entitled to receive the legacy before the date of payment arrives, is entitled to apply to the Court that a sufficient sum may be set apart to answer the legacy when it shall fall due. *Per* Lord Hardwicke, in *Phipps v. Amesley*, 2 Atk. 58; and in *Johnson v. Mills*, 1 Ves. Sen. 282; see, also, *Ferrand v. Prentice*, Amb. 273; *Green v. Pigot*, 1 Bro. C.C. 103; *Carcy v. Askew*, 2 Bro. C.C. 58.

C

Procedure when no fund charged with, or appropriated to, annuity¹.

123. Where an annuity is given and no fund is charged with its payment or appropriated by the will to answer it, a Government annuity of the specified amount shall be purchased, or,

[S. 303.]

if no such annuity, can be obtained, then a sum sufficient to produce the annuity shall be invested for that purpose in such securities as the High Court may, by any general rule to be made from time to time, authorize or direct.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 303 of the Indian Succession Act, X of 1865.

D

1.—“Procedure when no fund charged with, or appropriated to, annuity.”

(1) Annuity, defined.

As to this, see notes under S. 111, *supra*.

E

(2) A gift of annuity *simpliciter*, is a gift for life only.

(a) A simple gift of an annuity to A is, as a general rule, a gift during the life of A and nothing more. *Blewitt v. Roberts*, 1 Cr. and Ph. 274; *Kerr v. Middlesex Hospital*, 2 De. G.M. and G. 583.

F

(b) Thus, a bequest of £30 a year “from the interest of my funded property in the Bank of England” was held to be an annual charge of £30 upon the funded property for the legatee’s life, and not a bequest of so much stock as would produce that annual sum. *Wilson v. Moddis* in 2 Y. & Coll. Ch. C. 372.

G

(c) The simple grant of an annuity to a person carries no more than a life interest in the annuity, in the absence of a contrary intention. 5 Bom. L.R. 729.

H

(d) A monthly stipend of a sum of rupees to a daughter for her benefit given in her father’s will was held to be an annuity for her life. 1 M. H.C.R. 17.

I

1.—“*Procedure when no fund charged with or appropriated to, annuity*”

—(Continued).

(3) When a gift of annuity is perpetual.

- (a) When the annuity is given in such a way as to amount to a gift of the income of a particular fund without limit of time, or as a gift of so much capital as will produce the annual sum, or if the whole estate is distributed in the shape of annual sums, the annuity or annual sums will be perpetual. Theob., 6th Ed. 487 and see cases therein cited. J
- (b) Where a testator indicates the existence of the annuity without limit after the death of the person named, and therefore implies that it is to exist beyond the life of the annuitant, the annuity is presumed to be a perpetual annuity, and the bequest of the annuity is equivalent to a bequest of so much property as will produce the annuity in question, I Will. Exors., 10 Ed. 994 citing, *Blight v. Hartnoll*, 19 Ch. D. 294. K
- (c) To make an annuity created by will perpetual, there must be express words so describing it, or the testator must, by some language in will, indicate an intention to that effect. I Will., Exors., 10th Ed. 945. L

(4) Direction to purchase annuity—Construction.

- (a) A direction to purchase an annuity of so much a year is a direction to purchase a life annuity only; but in some cases a direction to purchase such an annuity in “the British Funds,” or in “Government Securities,” has been held a gift of so much consols as would produce the annual sum. *Kerr v. Middlesex Hospital*, 2 D. M. & G. 576; *Ross v. Borer*, 2 J. & H. 469; cited in Theob., 6th Ed. 488. M
- (b) A gift of Rs. 2,000 a year, being part of the moneys I have in the Bank of Bengal shares was held to give a perpetual annuity. *Rawlings v. Jennings*, 1 Madd. 253. N
- (c) A gift of Rs. 1,600 *per annum*, that is, “the interest of Rs. 40,000 of my 4 per cent. Government paper,” was held to give a perpetual annuity, *Stretch v. Watkins*. 1 Madd. 253. O

Bequest to purchase an annuity for life of legatee—Construction.

- (a) Where money is bequeathed to be invested in the purchase of an annuity for the life of the legatee, and the legatee dies before it is laid out, or even before the fund is available as during the life of the person after whose death the investment is to be made, yet, it is a vested legacy from the death of the testator, and the sum will belong to the personal representatives of the legatee. I Will. Exors., 10th Ed., 946 and see cases therein cited. P
- (b) Where money is bequeathed so be invested in the purchase of an annuity for the life of the legatee, and the legatee survives the testator, he may elect either to take the sum, or to have it laid out in an annuity. *Stokes v. Cheek*, 28 Beav. 620; *Dawson v. Harn*, 1 Russ. & M. 606. Q
- (c) Where a testator directed the purchase of an annuity to his sister for life to commence from his death, and the annuitant died after the testator but before the purchase of such annuity, held, the legal personal representative of the annuitant was entitled to the capital value of the annuity. *Gammon v. Dale*, 1909, 1 Ch. 276. R

1.—“Procedure when no fund charged with, or appropriated to, annuity”

—(Concluded).

(6) Failure of fund appropriated for annuity—On whom it falls.

- (a) Where an annuity is in a charge on the whole estate, the annuitant is entitled to the whole amount notwithstanding any appropriation of the fund by the executor. *May v. Bennett*, 1 Russ. Ch. Cas. 370; *Carmichel v. Gee*, 5 Ap. Cas. 588; *Davies v. Wattier*, 1 Sim. & Stu. 463; cited in II Will. Exors., 10th Ed. 1135-1136. **S**
- (b) But, where the appropriation is made in certain stock by the executor in conformity with the direction of the testator, so that the bequest may be regarded as a gift of the interest of the particular stock, the annuitant is bound to bear the loss consequent on the partial failure of the fund. *Kendell v. Russell*, 3 Sim. 424; cited in *Ibid.* **T**
- (c) Where the annuitant assents to the appropriation of some particular fund for the payment of the annuity, its failure, whether partial or total, would be at his risk. *Ibid.*, citing *Lumley on Annuities*, p. 298. **U**

124. Where a bequest is contingent, the executor is not bound [S. 304.]

Transfer to residuary legatee of contingent bequest ¹.

to invest the amount of the legacy, but may transfer the whole residue of the estate to the residuary legatee (if any) on his giving sufficient security for the payment of the legacy if it shall become due.

(Notes).

General.

(1) Corresponding Indian Law.

This section corresponds to S. 304 of the Indian Succession Act, X of 1865. **Y**

(2) Principle of the section.

The principle of the section is that the legatee being entitled to receive a certain sum in money when the contingent event happens, the legacy is not capable of being secured by the present appropriation of any sum of stock. *Per Leach*, V.C. in *Ibid.* **W**

1.—“Transfer to residuary legatee of contingent bequest.”

(1) Rules in the Succession Act as to contingent legacies.

- (i) Where a legacy is given if a specified uncertain event shall happen, and no time is mentioned in the will for the occurrence of that event, the legacy cannot take effect, unless such event happens before the period when the fund bequeathed is payable or distributable. (S. 111, Act X of 1865). **X**
- (ii) Where a bequest is made to such of certain persons as shall be surviving at some period, but the exact period is not specified, the legacy shall go to such of them as shall be alive at the time of payment or distribution, unless a contrary intention appear by the will. (S. 112, Act X of 1865). **Y**

(2) Residuary legatee, how constituted.

As to this, see notes under S. 19, *supra*.

Z

1.—“Transfer to residuary legatee of contingent bequest”—(Continued).**(3) Property to which residuary legatee entitled.**As to this, see S. 129, *infra* and notes thereto. **A****(4) “Surplus” and “residue” mean the same.**The words “surplus” and “residue” mean the same thing. *Per Pontifex, J*
in 4 C. 443. **B****(5) Residue may be paid over to residuary on giving security for payment of contingent legacy.**

Where a legacy of a certain sum of money is given, on a contingency, the Court will not direct a sum of stock belonging to the estate to be appropriated to pay the legacy when the contingency happens; but will direct the whole residue to be paid over to the residuary legatee, on his giving satisfactory security. *Webber v. Webber*, 1 Sim. & Stu. 312; see, also, *King v. Malcott*, 9 Hare 692; *Re Hall*, 1903, 2 Ch. 226; cited in II Will. Exors., 10th Ed. 1133. **C**

(6) Executor not entitled to appropriate any fund for payment of contingent legacy.

When a cash legacy is given upon the happening of a contingency, *e.g.*, on the legatee attaining 21, but without interest in the meantime, the executor is not entitled to set apart and invest the amount and appropriate the investment to satisfy the legacy, so that, if on the happening of the contingency, the investment has become depreciated in value, the legatee must bear the loss. *Re Hall*, 1903, 2 Ch. 226. **D**

(7) Tenant for life of contingent legacy is entitled to income of fund appropriated for the legacy.

In the case of contingent legacies, the tenant for life is entitled to the intermediate income of the fund set apart to meet them, that fund being residue until it is wanted. *Alhudson v. Whittell*, 4 Eq. 295. **E**

(8) Executor not bound to give notice to legatee, of the terms of the legacy.As to this, see notes under S. 137, *infra*. **F****(9) Illness or ignorance of legatee no excuse for non-performance of condition.**As to this, see notes under S. 137, *infra*. **G**

[S. 306.]

125. Where the testator has bequeathed the residue of his estate to a person for life with a direction that it shall be invested in certain specified securities, so much of the estate as is not at the time of his death invested in securities of the specified kind shall be converted into money and invested in such securities.

Investment of residue bequeathed for life, with direction to invest in specified securities 1.

(Notes).**General.****Corresponding Indian Law.**This section corresponds to S. 306 of the Indian Succession Act, X of 1865. **H**

1.—“Investment of residue bequeathed for life, with direction to invest in specified securities.”

(1) Liability for retaining money directed to be invested.

As to this, see notes under S. 147, *infra*.

I

(2) On a trust for sale with a power of retention, if the trustees cannot agree, the trust for sale will prevail.

Where a will contains a trust for conversion with a power to retain existing investments, and the trustees are not unanimous as to retention, the trust for sale prevails and the investments must be sold, even though within the investment clause in the will. *Gibbes v. Hale-Hinton*, 1909, 2 Ch. 548.

J

(3) Right to income of tenant-for-life of residuary legacy, when legacy invested in authorised securities.

Where the residue of an estate is given to a person for life, with remainder over, the tenant-for-life is entitled from the testator's death to the income of so much of the property as is invested in authorised securities. *Angerstein v. Martin*, T and R. 282; *Hewitt v. Morris*, *Ibid.*, 241; *Brown v. Gellatly*, 2 Ch. 751, cited in Theob., 6th Ed., 539, II. Will. Exors., 10th Ed., 1118.

K

(4) No section in the Probate Act corresponding to S. 305 of the Succession Act.

The Probate and Administration Act does not contain any section corresponding to S. 305 of the Succession Act which provides that where the testator has bequeathed the residue of his estate to a person for life without any direction to invest it in any particular securities, so much thereof as is not at the time of the testator's decease invested in such securities as the High Court may for the time being regard as good securities shall be converted into money and invested in such securities.

L

126. Such conversion and investment as are contemplated by [S. 307.]

Time and manner
of conversion and
investment¹.

the last preceding section shall be made at such times and in such manner as the executor in his discretion thinks fit ;

Interest payable
until investment².

and, until such conversion and investment shall be completed, the person who would be for the time being entitled to the income of the fund when so invested shall receive interest at the rate of 6 per cent. per annum upon the market-value (to be computed as of the date of the testator's death) of such part of the fund as shall not yet have been so invested.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 307 of the Indian Succession Act, X of 1865, but with the words “6 per cent.” used in place of the words “4 per cent.” of the latter section.

M

1.—“Time and manner of conversion and investment.”**Liability of executor or trustee retaining investment directed to be converted.**

(a) In England, where an executor or trustee is expressly directed to convert the estate, either immediately or within a reasonable time, and he retains investments made by the testator without reasonable cause, he will be charged, in the case of loss or depreciation, with the amount which such investment would have produced if disposed of at the time when the conversion ought to have been made. *Howe v. Dermouth*, 7 Ves. 137 ; *Brice v. Stokes*, 11 Ves. 319. N

(b) See also notes under Ss. 146 and 147, *infra*. O

2.—“Interest payable until investment.”**Right to income of tenant-for-life of residuary legacy, when legacy *not invested* in authorised securities.**

With regard to unauthorised securities, the tenant for life is entitled from the testator's death to the income which would be produced by the money if invested on authorised security at the end of a year from the testator's death. *Dimes v. Scott*, 4 Russ. 195 ; *Taylor v. Clark*, 1 Ha. 161 ; *Brown v. Gellatly*, 2 Ch. 751, cited in Theob., 6th Ed., 539 ; II Will. Exors., 10th Ed., 1118. P

[S. 308.]

127. Where, by the terms of a bequest, the legatee is entitled to the immediate payment or possession of the money or thing bequeathed, but is a minor, and there is no direction in the will to pay it to any person on his behalf, the executor or administrator shall pay or deliver the same into the Court of the District Judge by whom, or by whose District Delegate, the probate was, or letters of administration with the will annexed were, granted, to the account of the legatee, unless the legatee be a ward of the Court of Wards ;

and, if the legatee be a ward of the Court of Wards, the legacy shall be paid into that Court to his account ;

and such payment into the Court of the District Judge, or into the Court of Wards, as the case may be, shall be a sufficient discharge for the money so paid ;

and such money, when paid in, shall be invested in the purchase of Government securities, which, with the interest thereon, shall be transferred or paid to the person entitled thereto, or otherwise applied for his benefit, as the Judge or the Court of Wards, as the case may be, may direct.

(Notes).

General.

(1) Corresponding Indian Law.

This section corresponds to S. 308 of the Indian Succession Act, X of 1865. Q

(2) Corresponding English Law.

In England, by the Trustee Act, 1893, S. 42, an executor may pay a legacy due to an infant, after deduction of duty, into the Bank of England, with the privity of the Accountant-General of the Court of Chancery, to be placed to the account of the person for whose benefit the same should be paid. R

1.—“ Procedure where minor entitled to immediate payment or possession of bequest, and no direction to pay to person on his behalf.”

(1) Legacy to infant, not payable to infant or his relation without leave of Court.

Where a legatee is an infant and would be entitled to receive the legacy, if of age, the executor is not, justified in paying it either to the infant, on his account, without the sanction of a Court of Equity. II Will. Exors., 10th Ed., 1188; see *Cooper v. Thornton*, 3 Bro. C.C. 97. S

(2) When executor may allow maintenance out of capital of legacy.

In England, an executor cannot as a rule, apply any part of the capital of the legacy bequeathed to an infant for his maintenance, but the Court may grant an application for such purpose if either the total fund is small, or there is no other means of providing for the support of the child. II Will. Exors., 10th Ed., 1140. T

(3) When maintenance allowable out of income—By statute—English law.

With regard to applying the income of such legacy to the maintenance of the child, the executor is given extensive powers by the English Conveyancing and Law of Property Act, 1881. U

(4) When maintenance allowable out of income—By statute—Indian Law.

As to power of a trustee to apply the property of minor and its income for his maintenance, see S. 41, Indian Trusts Act, II of 1882. V

(5) When maintenance allowable out of income in English Law—Apart from statute.

Apart from statute, payments could always be made under English Law for maintenance out of the income of a legacy vested in possession though not where it is payable *in futuro* or is contingent. II Will. Exors., 10th Ed., 1145. W

(6) When maintenance allowable in case of contingent and *in futuro* legacies.

But maintenance is payable out of income even in the case of legacies contingent and payable *in futuro* in the following exceptional cases :—(See II Will. Exors., 10th Ed., 1146-1148). X

(i) Where the donor was the father of the legatee or stood *in loco parentis* to him; see *Chambers v. Goldwin*, 11 Ves. 1; *Martin v. Martin*, 1 Eq., 369; *Green v. Belcher*, 1 A. and K. 507; *Heath v. Perry*, 3 A. and K. 101. Y

(ii) Where it is inevitable that one or more members of the class will ultimately take. See *Haley v. Bannister*, 4 Madd. 275. Z

(iii) Where the consent of all parties who may be interested in reversion or otherwise has been obtained. A

1.—“Procedure where minor entitled to immediate payment or possession of bequest, and no direction to pay to person on his behalf”—(Concluded).

(7) No maintenance, if father alive and able.

The Court will not allow maintenance to an infant during the lifetime of its father, if the father be of ability to maintain and educate it according to its fortune and expectations. See *Butler v. Butler*, 3 Atk. 60; *Darley v. Darley*, 3 Atk. 399; *Jervois v. Silk*, *Coop*, 52. B

(8) Amount allowed for maintenance.

The amount allowed for maintenance depends partly upon the age and quality of the infant, and partly on the amount of the fund. II Will. Exors., 10th Ed., 1150. C

(9) Right of executor or administrator to pay legacy of infant or lunatic to Official Trustee, with leave of High Court.

As to this, see S. 32, Official Trustees Act, XVII of 1864. D

(10) Powers and duties of Court of the Court of Wards in Madras.

For—, see the Madras Court of Wards Act, I of 1902. E

(11) District Judge, definition.

As to this, see S. 3, *supra*. F

CHAPTER XI.

OF THE PRODUCE AND INTEREST OF LEGACIES.

[S. 309.]

Legatee's title to produce of specific legacy¹.

128. The legatee of a specific legacy is entitled to the clear produce thereof, if any, from the testator's death.

Exception ².—A specific bequest, contingent in its terms, does not comprise the produce of the legacy between the death of the testator and the vesting of the legacy. The clear produce of it forms part of the residue of the testator's estate.

Illustrations.

(a) A bequeaths his flock of sheep to B. Between the death of A and delivery by his executor the sheep are shorn, or some of the ewes produce lambs. The wool and lambs are the property of B.

(b) A bequeaths his Government securities to B, but postpones the delivery of them till the death of C. The interest which falls due between the death of A and the death of C belongs to B, and must, unless he is a minor, be paid to him as it is received.

(c) The testator bequeaths all his 4 per cent. Government promissory notes to A when he shall complete the age of 18. A, if he complete that age, is entitled to receive the notes, but the interest which accrues in respect of them, between the testator's death and A's completing 18, forms part of the residue.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 309 of the Indian Succession Act, X of 1865. G

1.—“*Legatee's title to produce of specific legacy.*”(1) *Specific legacy, defined.*

As to this, see S. 3, *supra*. H

(2) *Distinction between general and specific legacies.*

As to this, see notes under S. 3, *supra*. I

(3) *Reason of the rule in the section.*

Specific legacies are considered as separated from the general estate and appropriated at the time of the testator's death; and consequently, from that period, whatever produce accrues upon them belongs to the legatee. *Sleech v. Thorington*, 2 Ves. Sen. 563, cited in II Will. Exors., 10th Ed., 1162. J

(4) *Rule in the section applies even where enjoyment is postponed.*

The above rule applies, even where the enjoyment of the principal is postponed by the testator. (*Ibid.*) See Illus. (b). K

(5) *Illustration (a).*

Illustration (a) is taken from Wentworth's Office of Executor, 14th Ed., 445, cited in II Will. Exors., 10th Ed., 1162. L

(6) *Specific legacy of stock carries the dividends from death of testator.*

On a specific legacy of stock, the dividends belong to the legatee from the death of the testator. *Barrington v. Tristram*, 6 Ves. 345; *Bristow v. Bristow*, 5 Beav. 289; *Clive v. Clive*, Kay 600.; cited in *Ibid.* See Illus. (b). M

(7) *Whether legacy relates to date of will or death of testator.*

The description contained in a will of property the subject of gift shall, unless a contrary intention appear by the will be deemed to refer to and comprise the property answering that description at the death of the testator. (S. 77 of the Indian Succession Act, X of 1865.) N

2.—“*Exception.*”

Rules as to contingent legacies.

As to this, see notes under S. 124, *supra*. O

Interest on demonstrative legacies.

(1) *Demonstrative legacy, defined.*

As to this, see S. 3, *supra*, and notes thereto. P

(2) *Demonstrative legacy distinguished from general and specific legacies.*

As to this, see notes under S. 3, *supra*. Q

2.—“Exception”—(Concluded).**Interest on demonstrative legacies—(Concluded).**

- (3) **Absence of provision for interest on demonstrative legacy does not imply intention to disallow it.** •

The absence of a distinct provision for payment of interest on demonstrative legacies in Ss. 128, 130 and 131 of the Probate Act, does not imply an intention to disallow interest in such cases. 29 M. 155 (160). R

- (4) **Demonstrative legacy carries interest from one year after testator's death.**

Under the English Law, interest is payable on demonstrative legacies from the expiry of one year from the testator's death. 29 M. 155, *citing Mullins v. Smith*, 1 Dr. & Sm. 204; *Londesborough v. Somerville*, 19 Beav. 295. S

- (5) **Demonstrative legacy is of the nature of general legacy in respect of interest.**

In the matter of interest, demonstrative legacies are to be viewed as of the nature of general legacies. *Mullins v. Smith*, 1 Dr. & Sm. 204, *cited* in 29 M. 155 (160). T

[S. 310.]

Residuary legatee's title to produce of residuary fund ¹.

129. The legatee under a general residuary bequest is entitled to the produce of the residuary fund from the testator's death.

Exception 2.—A general residuary bequest contingent in its terms does not comprise the income which may accrue upon the fund bequeathed between the death of the testator and the vesting of the legacy. Such income goes as undisposed of.

Illustrations.

(a) The testator bequeaths the residue of his property to A, a minor, to be paid to him when he shall complete the age of 18. The income from the testator's death belongs to A.

(b) The testator bequeaths the residue of his property to A, when he shall complete the age of 18. A, if he complete that age, is entitled to receive the residue. The income which has accrued in respect of it since the testator's death goes as undisposed of.

(Notes).**General.****Corresponding Indian Law.**

This section corresponds to S. 310 of the Indian Succession Act, X of 1865. U

1.—“Residuary legatee's title to produce of residuary fund.”

- (1) **Residuary legatee, how constituted.**

As to this, see notes under S. 19, *supra*. V

- (2) **Property to which residuary legatee entitled.**

Under a residuary bequest, the legatee is entitled to all property belonging to that testator at the time of his death, of which he has not made any other testamentary disposition which is capable of taking effect. (S. 90 of the Indian succession Act, X of 1865.) W

1.—“Residuary legatee's title to produce of residuary fund” —(Concluded).

(3) What a general residuary legatee is entitled to.

- (a) Where the residuary legatee is nominated generally, he is entitled, in that character, to whatever may fall into the residue after the making of the will, by lapse, invalid disposition, or other accident, or by acquirement subsequent to the date of the will. II Will. Exors., 10th Ed., 1199. **X**
- (b) A residuary bequest carries not only everything not disposed of, but everything that, in the event, turns out to be not disposed of. *Per Sir W. Grant in Cambridge v. Rouse*, 8 Ves., 12 (25). **Y**
- (c) The residuary legatee takes, not only what is undisposed of by the expressions of the will, but that which becomes undisposed of at the death, by disappointment of the intentions of the will. *Per Leach, V. C. in Jones v. Mitchell*, 1 Sim. and Stu. 294. **Z**
- (d) It is only a general residuary bequest that passes everything not disposed of, whether the testator has not attempted to dispose of it, or whether the disposition fails by lapse or any other event. *Bernard v. Minshall*, Johns 276; *Paton v. Ormerod*, 1899, 3 Ch. 348. **A**
- (e) The residuary legatee in order to take the whole, must be a general legatee; for, if the testator confines the residue to what may remain after certain deductions, the residuary legatee becomes a specific legatee. *Per Lord Cottenham in Pasum v. Appleford*, 5 My. and Cr. 56. **B**
- (f) A residuary clause will comprise all property which is not effectually disposed of by the will, whether by reason of lapse, remoteness of the bequest or otherwise. *Bernard v. Minshall*, 1 John. 276; *Leake v. Robinson*, 2 Mer. 392. **C**

(4) Residuary legatee, entitled to both moveable and immoveable property in India.

Under a residuary bequest, a legatee in India is entitled to immoveable as well as moveable property. 22 W.R. 174. **D**

(5) General residuary bequest carries intermediate income.

A general residuary bequest, contingent in terms, carries the intermediate income, which is not undisposed of, but accumulates. *Trevanion v. Vivian*, 2 Ves. Sen. 430. **E**

(6) Residuary gift of real and personal estates carries intermediate income.

Although a devise of real estate does not carry the intermediate rents and profits until the period of vesting, a gift of the testator's real and personal estate, though contingent in terms, carries the intermediate rents and profits of the real estate, as well as the income of the personal estate. *Stephens v. Stephens*, Forest, 228; *Ackers v. Phipps*, 3 Cl. and F. 691: cited in Hawkins, 45. **F**

(6) Illustration (a).

Where the payment of legacy is postponed to the legatee attaining a particular age or marrying, interest is payable on it from death of testator till date of payment. *Hiscock v. Lodder*, 1909, 2 Ch. 341; see Illus. (a). **G**

2.—“Exception.”**(1) Rules as to contingent legacies.**As to this, see notes under S. 124, *supra*.**H****(2) Illustration (b), meaning.**

The meaning of Illustration (b) is, that the income falls into the residue to accumulate for the benefit of the residuary legatee, or for the executor or next-of-kin of the testator upon the event of the residuary legatee's death before the legacy vests in him, or for such other person as may on that contingency be named to take. See *Green v. Elkins*, 2 Atk. 472.

I**[S. 311.]**

Interest when no time fixed for payment of general legacy ¹.

130. Where no time has been fixed for the payment of a general legacy, interest begins to run from the expiration of one year from the testator's death.

Exceptions.—(1) ² Where the legacy is bequeathed in satisfaction of a debt, interest runs from the death of the testator.

(2) ³ Where the testator was a parent or a more remote ancestor of the legatee, or has put himself in the place of a parent of the legatee, the legacy shall bear interest from the death of the testator.

(3) ⁴ Where a sum is bequeathed to a minor with a direction to pay for his maintenance out of it, interest is payable from the death of the testator.

(Notes).**General.****Corresponding Indian Law.**This section corresponds to S. 311 of the Indian Succession Act, X of 1865. **J****1.—“Interest when no time fixed for payment of general legacy.”****(1) General legacy, defined.**As to this, see notes under S. 3, *supra*.**K****(2) Rule in section is based on English Law.**

(a) The rule in S. 130 is based on the English cases of *Wood v. Penoyre*, 13 Ves. 333; *Gibson v. Bott*, 7 Ves. 96, cited in II Will. Exors., 10th Ed., 1163.

L

(b) General legacies in their nature carry interest, such interest being computed from the time at which the principal is actually due and payable. II Will. Exors., 10th Ed., 1163.

M**(3) Rule in section not affected by a direction to pay legacy “as soon as possible.”**

The above rule is not affected by a direction in the will to pay the legacy “as soon as possible.” *Webster v. Hale*, 8 Ves. 410; *Benson v. Maude*, 6 Madd. 15, cited in *Ibid*.

N

1.—“Interest when no time fixed for payment of general legacy”—(Cld.).

(4) Rule in section applies even though assets unproductive.

A general legacy carries interest from the expiration of one year from the testator's death, although payment be, from the condition of the estate, impracticable, and although the assets have been unproductive. *Wood v. Penoyre*, 13 Ves 334; *Pearson v. Pearson*, 1 Sch. & Lef. 10, cited in II Will. Exors., 10th Ed., 1165. **O**

(5) The year's time is counted from death of testator.

Thus, where a legacy was given to A, to be paid at 21, and if he should die before 21, then to B, and A died before 21, several years after the testator; it was held that, B was entitled to interest on the legacy from the death of A, A having died more than 1 year from the death of the testator. *Laundy v. Williams*, 2 P. Wms. 491. **P**

2.—“Exception (1).”

(1) Exception (1)—Legacy in satisfaction of debt.

(a) Exception (1) to S. 130 is based on the English case of *Clarke v. Sewell* 3 Atk. 99. **Q**

(b) For an Indian case in which Exception (1) was applied, see 25 M. 361. **R**

(2) But legacy in satisfaction of debt of another does not come within the exception.

But, where the legacy is in satisfaction of the debt of another person, interest is not so payable. *Askew v. Thompson*, 4 K. & J. 620. **S**

3.—“Exception (2).”

(1) Exception (2)—Legacy by parent or person *in loco parentis*.

Exception (2) is based on the English cases of *Wilson v. Maddison*, 2 Y. & C. Ch. C. 372; *Beckford v. Tobin*, 1 Ves. Sen. 310; *Crickett v. Dolby*, 3 Ves. 18. **T**

(2) Person *in loco parentis*, described.

(a) A person *in loco parentis* to a child is a person who means to put himself in the situation of the lawful father of the child, with reference to the father's office and duty of making a provision for the child. *Powys v. Mansfield*, 3 My. and Cr. 359. **U**

(b) Mothers, great uncles, uncles, grand parents, and putative fathers are not to be considered *in loco parentum*, unless they have intended to assume the office and duty of a parent. II Will. Exors., 10th Ed., 1077. **Y**

(c) A person may stand *in loco parentis* to a child, though living with and maintained by the father. *Powys v. Mansfield*, 3 My. & Cr. 359. **W**

(d) A grandfather, making provision for his son's daughter, a minor, the son himself being alive, is not a person *in loco parentis* to that daughter. 7 Bom. L.R. 299. **X**

(3) Where infant is *en ventre* as testator's death.

If the infant is *en ventre sa mere* at the testator's death, interest will run only from his birth. *Rawlins v. Rawlins*, 2 Cox. 425. **Y**

3.—“Exception (2)”—(Concluded).**(4) Exception not confined to legitimate children.**

Exception (2) is not confined to legitimate children only. *Newman v. Bateson*, 3 Swanst. 689, *not following*; *Lowndes v. Lowndes*, 15 Ves. 301. **Z**

(5) Exception does not extend to adults.

The Exception is confined to legacies in favour of infants and is not extended, to adults or even wife. *Raven v. White*, 1 Swanst. 553; *Wall v. Wall*, 15 Sim. 513; *Stent v. Robinson*, 12 Ves. 461; *Re Whitaker*, 21 Ch. D. 657. **A**

(6) Exception (2) to S. 130 compared with Exception to S. 131.

While Exception to S. 131 requires the legatee to be a minor, there is no such provision in Exception (2) to S. 130. **B**

4.—“Exception (3).”**(1) Exception (3)—Legacy to minor with direction to pay maintenance.**

Exception (3) is based on the English cases of *Re Richards*, 8 Eq. 119; *Pickwick v. Gibbes*, 1 Beav. 271; *Newman v. Bateson*, 3 Sw. 689; *Chidgley v. Whitby*, 41 L.J. Ch. 699. **C**

(2) Exception not confined to minors related to testator.

Exception (3) is not confined to minors related to the testator. See *Majumdar*, 664. **D**

(3) Exception does not apply where gift is not to infant directly.

Exception (3) does not apply where the gift is not made to the infant directly. Thus, where a testator gave the income of legacy to his daughter-in-law during her widowhood subject to the obligation of maintaining and educating her children, *held*, the legacy did not carry interest from the date of the testator's death. *Adams v. Crone*, 1908, 1 Ch. 379. **E**

[S. 312.] **131.** Where a time has been fixed for the payment of a general legacy, interest begins to run from the time so fixed. The interest up to such time forms part of the residue of the testator's estate.

Interest when time fixed 1.

Exception 2.—Where the testator was a parent or a more remote ancestor of the legatee, or has put himself in the place of a parent of the legatee, and the legatee is a minor, the legacy shall bear interest from the death of the testator, unless a specific sum is given by the will for maintenance, or unless the will contains a direction to the contrary.

(Notes).**General.****Corresponding Indian Law.**

This section corresponds to S. 312 of the Indian Succession Act, X of 1865, but contains in addition the words “or unless the will contains a direction to the contrary” at the end of the section. **F**

1.—“Interest when time fixed.”

- (1) Rule in section is based on English Law.

The rule in S. 131 is based on the English cases of *Heath v. Perry*, 3 Atk. 101; *Tyrrrell v. Tyrrrell*, 4 Ves. 1; *Earley v. Bellingham*, 24; Beav. 448. G

- (2) Where time fixed has arrived in testator's life-time.

Where the time fixed has arrived in the lifetime of the testator, the legacy will carry interest from his death. *Coventry v. Higgins*, 14 Sim. 30. H

2.—“Exception.”

- (1) The Exception is based on English law.

The Exception to the section is based on the English cases of *Acherley v. Vernon*, 1 P. Wms. 183 *Hill v. Hill*, 3 V. and B. 183; *Mills v. Roberts*, 1 Russ. and M. 555; and see other cases cited in II Will. Exors., 10th Ed., 1268. I

- (2) Scope of the Exception.

The rule in the Exception is not extended in favour of nephews and nieces, or of grandchildren, unless the testator was *in loco parentis*. *Haughton v. Harrison*, 2 Atk. 330; *Butler v. Freeman*, 3 Atk. 58; *Crickett v. Dolby*, 3 Ves. 10, cited in II Will. Exors., 10th Ed. 1169. J

- (3) Person
- in loco parentis*
- , described.

As to this, see notes under S. 130, *supra*. K

- (4) Where specific sum given by the will for maintenance—Effect.

Where the legatee is a child of the testator, and a specific sum is given by the will for maintenance, no greater allowance can be claimed for that purpose, although it is less than the usual rate of interest upon the legacy. *Hearle v. Greenbank*, 3 Atk. 716; *Long v. Long*, 3 Ves. 286n; *Ellis v. Ellis*, 1 Sch. and Lef. 1; *Re George*, 5 Ch. D. 837, cited in II Will. Exors., 10th Ed., 1168. L

- (5) When such sum may be increased.

The allowance may be increased in a special case, as where it is insufficient for a reasonable maintenance, and where the legacy is vested. *Aynsworth v. Pratchett*, 13 Ves. 321; *Turner v. Turner*, 4 Sim. 430. M

- (6) Analogous rule in English Law in the case of legacies payable
- in futuro*
- .

In English Law, legacies payable *in futuro*, though not given by a parent or person *in loco parentis*, will carry interest where there appears an intention on the part of the testator that the legatees shall be maintained out of the property bequeathed to them. *Leslie v. Leslie*, Cas. Temp. Sugd. 1; *Boddy v. Dawes*, 1 Keen 362, cited in II Will. Exors., 10th Ed., 1169. N

- (7) Second exception to rule in section—Where fund directed to be severed from testator's death for benefit of legatee.

In English Law, there is a second exception to the rule in the section where a fund is severed immediately by the testator's direction from his death for the benefit of the objects of the gift in which case, the gift will carry the *interim* income. *Re Dickson*, 29 Ch. D. 331; *Re Inman*, 1893, 3 Ch. 518; *Re Clements*, 1894, 1 Ch. 665; *Re Woodin*, 1895, 2 Ch. 309, cited in II Will. Exors., 10th Ed., 1167. O

[S. 313.]

Rate of interest ¹.

132. The rate of interest shall be six per cent. per annum.

(Notes).

General.**Corresponding Indian Law.**

This section corresponds to S. 313 of the Indian Succession Act, X of 1865, but with the words "six per cent." used in place of the words "four per cent." of the latter section. P

1.—"Rate of interest."

- (1) **English Law, like the Succession Act allows only $\frac{1}{4}$ per cent.**

See II Wills. Exors. 10th Ed. 1171. Q

- (2) **When interest at 5 per cent. will be allowed as against the executor in English Law,**

Interest at 5 per cent. will be allowed as against the executor, when the property has been employed by him in trade. *Heathcote v. Hulme*, 1 Jac. and Walk. 122; *Williams v. Powell*, 12 Beav. 461, cited in *Ibid.* R

- (3) **When compound interest will be allowed in English Law.**

The interest allowed is only simple, except under particular circumstances, when the Court will allow *compound interest*, as where there is an express direction in the will that the executor should lay out the fund to accumulate and he neglects to do so. *Raphael v. Boehm*, 11 Ves. 92; 13 Ves. 590 and see other cases cited in II Will, Exors., 10th Ed., 1172. S

[S. 314.]

133. No interest is payable on the arrears of an annuity ¹ within the first year from the death of the testator, although a period earlier than the expiration of that year may have been fixed by the will for making the first payment of the annuity.

No interest on arrears of annuity within first year after testator's death.

(Notes).

General.**Corresponding Indian Law.**

This section corresponds to S. 314 of the Indian Succession Act, X of 1865. T

1.—"No interest is payable on the arrears of an annuity."

- (1) **Annuity, defined.**

As to this, see notes under S. 111, *supra*. U

- (2) **Exceptional cases where interest is payable on arrears of annuity.**

i. Where the person charged with the payment of the annuity has incurred a forfeiture by non-payment. *Ferrers v. Ferrers*, Cas. Temp; Talb. V

2. Y
ii. Where the annuitant has held some legal security, which he might have made available for the payment of interest. *Torre v. Brown*, 5 H. L.C. 578. W

iii. Where the arrears has accumulated by the misconduct of the party, bound to pay. (*Ibid.*) X

Interest on sum
to be invested to
produce annuity.

134. Where a sum of money is directed to be invested to produce an annuity, interest is payable on it from the death of the testator. [S. 315.]

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 315 of the Indian Succession Act, X of 1865.

N.B.—See notes under S. 123, *supra*.

Y

CHAPTER XII.

OF THE REFUNDING OF LEGACIES.

N.B.—The provisions in Chap. XII as to an executor apply also to an administrator with the will annexed. See S. 148, *infra*.

135. An executor who has paid a legacy under the order of a Judge is entitled to call upon the legatee to refund in the event of the assets proving insufficient to pay all the legacies. [S. 316.]

Refund of legacy
paid under Judge's
orders 1.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 316 of the Indian Succession Act, X of 1865. **Z**

1.—“Refund of legacy paid under Judge's orders.”

Executor's right to demand refund of legacy paid under compulsion.

Where an executor has paid a legacy under the compulsion of a suit, he can compel the legatee to refund, in case of a deficiency of assets. *Newman v. Barton*, 2 Vern. 205; *Noel v. Robinson*, 2 Ventr. 368, cited in II Will. Exors., 10th Ed., 1188. **A**

136. When an executor has voluntarily paid a legacy, he cannot call upon a legatee to refund in the event of the assets proving insufficient to pay all the legacies. [S. 317.]

No refund if paid
voluntarily 1.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 317 of the Indian Succession Act, X of 1865. **B**

1.—“No refund if paid voluntarily.”

Executor cannot demand refund of legacy paid voluntarily.

Whenever an executor pays a legacy, the presumption is, that he has sufficient to pay all legacies, and the Court will oblige him, if solvent, to pay the rest; and not permit him to bring a bill to compel the legatee, whom he voluntarily paid, to refund. *Per Sir John Strange, M.R. in Orr v. Kaines*, 2 Ves. Sen. 194. **C**

[S. 318.]

137. When the time prescribed by the will for the performance of a condition has elapsed, without the condition having been performed, and the executor has thereupon, without fraud, distributed the assets, in such case, if further time has, under the second clause of this section, been allowed for the performance of the condition, and the condition has been performed accordingly, the legacy cannot be claimed from the executor, but those to whom he has paid it are liable to refund the amount.

Where the will requires an act to be performed by the legatee within a specified time, either as a condition to be fulfilled before the legacy is enjoyed, or as a condition upon the non-fulfilment of which the subject-matter of the bequest is to go over to another person, or the bequest is to cease to have effect, the act must be performed within the time specified, unless the performance of it be prevented by fraud, in which case such further time shall be allowed as is requisite to make up for the delay caused by such fraud.

(Notes).**General.****Corresponding Indian Law.**

- (a) The first para of this section corresponds to S. 318 of the Indian Succession Act, X of 1865; and the second para, to S. 124 of that Act. **D**
- (b) The second para of the section may also be compared with S. 34 of the Transfer of Property Act, IV of 1882. **E**
- (c) But while S. 34 of the Transfer of Property Act speaks of the fraud "of a person who would be directly benefited by non-fulfilment of the condition," There are no similar words in S. 137 of the Probate and Administration Act. This omission seems to be intentional. See 20 C. 15. **F**
- (d) The second para of S. 137 may also be compared with S. 18 of the Indian Limitation Act, IX of 1908, as to the effect of fraud. **G**

1.—"Refund when legacy becomes due on performance of condition within further time allowed."

(1) Assets, meaning.

As to this, see notes under S. 62, *supra*.

H**(2) Principle of the second para of the section.**

The principle of the second para of S. 137 is that as no man can take advantage of his own wrong, relief is given to the party to whose interest it is that the condition should be fulfilled. Shep. and Brown, 6th Ed., 109, citing *Edwards v. Aberayron*, M.I. Society, 1 Q.B.D. 563. **I**

1.—“Refund when legacy becomes due on performance of condition within further time allowed”—(Concluded).

(3) “Specified time,” how computed.

In computing the time for the purpose of ascertaining whether the condition had been performed within the specified time, the day of the testator's death is excluded, as the legatee could not be expected to begin the deliberation which was to govern the election to be made ultimately. *Lester v. Garland*, 15 Ves. 248; *Gorst v. Lowndes*, 11 Sim. 434. **J**

(4) Whether “specified time” can be construed as reasonable time.

(a) Where a legatee is required to perform a certain act within a certain time, he is entitled to a reasonable time in which to perform the condition. *Simpson v. Vickers*, 14 Ves. 341; *Paine v. Hyde*, 4 Beav. 468; *Wilkins v. Knipe*, 5 Beav. 273. **K**

(b) But the observance of the time mentioned in the condition may in any case be material to the due performance of it. 1 Will. Exors., 10th Ed., 1014. **L**

(c) Thus, where the condition was that the legatee shall return within a time specified and personally apply for his legacy, it was held that the condition must be performed within the time limited. *Hawkes v. Baldwin*, 9 Sim. 355. **M**

(5) Executor not bound to give notice to legatee of the terms of the legacy.

The executor owes no duty to the legatee to give notice of the terms of the legacy even though he takes a beneficial interest in the legacy on the breach of the condition. *Re Lewis*, 1904, 2 Ch. 656. **N**

(6) Illness or ignorance of legatee no excuse for non-performance of condition.

(a) Except in case of fraud, neither ignorance, illness nor neglect on the part of the executor to inform the legatee, can excuse the latter from not complying with the direction so as to entitle him to the gift. Per Wrickens V.C. in *In re Hodges*, Legacy, 16 Eq. 92 (96); see, also, *Astley v. Earl of Essex*, 18 Eq. 290 (297). **O**

(b) The performance of the condition is not affected by the ignorance of the legatee, the principle being that a person who takes by gift under a will cannot plead want of knowledge of the contents of the will as an excuse for not complying with its provisions. *Astley v. Earl of Essex*, 18 Eq. 290. *Powell v. Rawle*, 18 Eq. 243. **P**

(c) But this rule does not apply where the devisee is the heir, who has a title independent of the will. *Doe d. Kenrick v. Lord Bunclerke*, 11 East 667. **Q**

(7) Definition of fraud.

(a) As to this, see S. 17 of the Indian Contract Act, IX of 1872. **R**

(b) Fraud is a false representation of fact, made with a knowledge of its falsehood, or recklessly, without belief in its truth, with the intention that it should be acted upon by the complaining party, and actually inducing him to act upon it. Sir William Anson. **S**

[S. 319.]

138. When the executor has paid away the assets in legacies, and he is afterwards obliged to discharge a debt of which he had no previous notice, he is entitled to call upon each legatee to refund in proportion.

When each legatee compellable to refund in proportion 1.

(Notes).

General.

(1) Corresponding Indian Law.

This section corresponds to S. 319 or the Indian Succession Act, X of 1865. **S-1**

(2) Section based on Williams.**T**

S. 138 is based on William's Executors. See II Will. Exors., 10th Ed., 1188. *citing, Nelthorpe v. Biscoe*, 1 Chanc. Cas. 136; *Davis v. Davis*, 3 Vin. Abr. 423; *Doe v. Guy*, 3 East 120 (123). **U**

I.—“When each legatee compellable to refund in proportion.”**(1) Executor paying with notice of debt cannot demand refund.**

An executor cannot compel residuary legatees to refund if he has paid over the assets with notice of a debt. *Jervis v. Wolferstan*, 18 Eq. 18. **V**

(2) Notice of contingent liability is not such notice as is contemplated by the section.

A notice of a possible remote contingent liability is *not* sufficient to disable an executor from recovering back the assets when it afterwards ripens into a debt, e.g., a liability for calls on shares. *Whittaker v. Kershaw*, 45 Ch.D. 320. **W**

(3) Want of notice of debt will not *per se* excuse executor from payment.

As to this, see notes under S. 104, *supra*. **X**

(4) “Assets,” meaning.

As to this, see notes under S. 62, *supra*. **Y**

[S. 320.]

139. Where an executor or administrator has given such Distribution of notices as the High Court may, by any general assets 1. rule to be made from time to time, prescribe, for creditors and others to send in to him their claims against the estate of the deceased, he shall, at the expiration of the time therein named for sending in claims, be at liberty to distribute the assets, or any part thereof, in discharge of such lawful claims as he knows of, and shall not be liable for the assets so distributed to any person of whose claim he has not had notice at the time of such distribution;

but nothing herein contained shall prejudice the right of any Creditor may follow creditor or claimant to follow the assets, or any assets. part thereof, in the hands of the persons who may have received the same respectively.

(Notes).

General.

(1) Corresponding Indian Law.

This section corresponds to S. 320 of the Indian Succession Act, X of 1865, but with the words "as the High Court may, by any general rule to be made from time to time, prescribe" used in place of the words "as would have been given by the High Court in an administration suit" of the latter section. Z

(2) Corresponding English Law.

In England by St. 22 & 23 Vict., C. 35, S. 29, Lord St. Leonards' Act, after giving proper notices to send in all claims against the estate, an executor distributing the assets at the expiration of the time mentioned in the notices, is not liable for any debts of which he had no notice, without prejudice to the right of any such creditor to follow the assets. A

(3) Principle embodied in the section.

The principle embodied in S. 139 is that the remedy is against those who have received the assets, and not against those who have parted with them. *Per Malins, V. C. in Clegg v. Rowland*, 3 Eq. 368. B

I.—"Distribution of assets."

(1) Failure to send in claim does not discharge executor who has notice otherwise.

An executor with notice of a claim against the estate is not discharged by the fact that the person entitled to make the claim has failed to send in his claim. *Markwell's Case*, 21 W.R. (Eng.) 135. C

(2) Position of creditors on administration of estate by Court.

(a) The general principle governing the position of creditors of an estate under administration by the Court is that they will on due cause shown be let in at any time while the fund is in Court, even where the money has been apportioned and transferred to the Accountant-General for payment to them. 9 C.W.N. 167, referring to *Lashley v. Hogg*, 11 Ves. 602; *Hartwell v. Colvin*, 16 Beav. 143; *Angell v. Haddon*, 1 Madd. 529; *David v. Frowd*, 1 Myl. and Cr. 200. D

(b) But, when any creditor has been guilty of remissness in the assertion of his claim, his default shall not be allowed to operate so as to prejudice or inconvenience others more diligent than himself. *Ibid.*, citing, *Cattell v. Simons*, 8 Beav. 243. E

(c) The legal position of a creditor who for some reason or other has been excluded from a first dividend and subsequently gets his claim admitted to the schedule so as not to disturb past dividends, is, that if further assets come in, he is entitled to have a preferential dividend paid to him out of such assets before any further dividend is paid. *Ibid.*, citing, *Snee v. Prescott*, 1 Atk. 246. F

(d) See also S. 39, Provincial Insolvency Act, III of 1907, and S. 72, Presidency Towns Insolvency Act, III of 1909. G

(3) Practice of the Madras High Court as to advertisement for creditors.

According to the practice of the Madras High Court, every advertisement for creditors or other persons having any claims upon, or interest in, the distribution of any assets to be administered by the Court, which is

1.—“Distribution of assets”—(Concluded).

issued pursuant to any decree or order, shall direct every such creditor or other person, within a time to be thereby fixed, to send to the Registrar his name and address and full particulars of his claim or interest, and a statement of his account and the nature of the security (if any) held by him and shall appoint a day for adjudicating on the claims. Madras H.C.O.S. Rule No. 362. H

(4) Practice of the Calcutta High Court.

For similar practice of the Calcutta High Court and form of advertisement for creditors, see Belchamber, pp. 254 and 411. I

(5) Distribution of assets after advertisement by the Administrator-General.

As to this, see S. 28, Act II of 1874. J

(6) “Assets,” meaning.

As to this, see notes under S. 62, *supra*. K

(7) High Court, definition.

As to this, see notes under S. 52, *supra*. L

[S. 321.]

140. A creditor who has not received payment of his debt may call upon a legatee who has received payment of his legacy to refund, whether the assets of the testator's estate were or were not sufficient at the time of his death to pay both debts and legacies, and whether the payment of the legacy by the executor was voluntary or not.

(Notes).

General.

(1) Corresponding Indian Law.

This section corresponds to S. 321 of the Indian Succession Act, X of 1865. M

(2) Section copied from Williams.

S. 140 is extracted from Williams on Executors. See II Will. Exors., 10th Ed., 1189; citing *Hodges v. Waddington*, 2 Vent. 360; *Noel v. Robinson*, 1 Vern. 94; *Newman v. Barton*, 2 Vern. 205; *Gillespie v. Alexander*, 3 Russ. Ch. C. 136; *March v. Russell*, 3 M. & Cr. 31; *Noble v. Brett*, 24 Beav. 499; *Jervis v. Wolferstan*, 18 Eq. 18; *Hunter v. Young*, 4 Ex. D. 256; *Thomas v. Griffith*, 2 Giff. 504. N

1.—“Creditor may call upon legatee to refund.”

(1) Unsatisfied creditor has no lien or charge on the assets.

An unsatisfied creditor has no lien or charge on any assets, and persons dealing with the executor in good faith are entitled to look to him alone, not being bound to ascertain that all debts have been discharged. *Graham v. Drummond*, 1896, 1 Ch. 968. O

(2) Creditor's right to demand refund not lost by want of notice on executor's part.

The creditor's right to call upon a legatee to refund exists even though the assets were handed over to the legatee by the personal representative in ignorance of the creditor's demand. *March v. Russell*, 3 M. & Cr. 31. P

I.—“Creditor may call upon legatee to refund”—(Concluded).

(3) Creditor's right to demand refund how lost.

(a) This right may be lost by laches, acquiescence or such a course of dealing as would render the assertion of such right inequitable. *Ridgway v. Newstead*, 30 L.J. Ch. 889. Q

(b) It may also be barred by limitation. See Art. 43, Indian Limitation Act, IX of 1908. R

(4) Amount which late-coming creditor is entitled to receive out of funds administered by Court.

Where an estate is administered in Court, a creditor coming in after some legatees have received their legacies in full, and while there are some funds in Court to be paid to other legatees, is entitled to receive only a proportionate share of the debt and will have to seek payment of the rest of the debt from the legatees fully paid. *Gillespie v. Alexander*, 3 Russ. Chanc. Cas. 130; explained in *Davies v. Nicolson*, 2 De.G. & J. 693; cited in II Will. Exors., 10th Ed., 1086, 1087. S

(5) Remedy of creditor coming in after distribution under order of Court.

If a creditor does not come in till after the executor has paid away the residue in pursuance of the judgment in an administration suit, he is not without remedy, though he is barred from the benefit of that judgment. If he wants to compel the legatees to refund, he must do so by suit. He cannot proceed against the executor where the distribution has been under the order of the Court or after advertisement in pursuance of the statute. II Will. Exors., 10th Ed., 1085. T

(6) Creditor has a right to follow assets in the hands of legatees and executors.

Creditors have a right to follow assets in the hands of legatees, as well as of executors. *Hawkins v. Day*, Harg. Mss. Ambl. 804; *March v. Russell*, 3 My. and Cr. 42; cited in II Will. Exors., 10th Ed., 1082. U

(7) But not as against a bona fide purchaser for value from executor.

An unsatisfied creditor cannot follow the assets into the hands of a purchaser for value from an executor also a legatee without notice of the existence of unsatisfied debts or of any impropriety in the sale. II Will. Exors., 10th Ed., 1190; citing *Graham v. Drummond*, 1896, 1 Ch 968; *Dilke v. Broadmead*, 2 Giff. 113. V

(8) “Assets,” meaning.

As to this, see notes under S. 62, *supra*. W

(9) Limitation for a suit to compel a refund.

The limitation for a suit to compel a refund under S. 139 or S. 140 by a person to whom an executor or administrator has paid a legacy or distributed assets, is three years from the date of payment or distribution. Art. 43, Limitation Act, IX of 1908. X

[S. 322.]

141. If the assets were sufficient to satisfy all the legacies at

When legatee, not satisfied or compelled to refund under section 140, cannot oblige one paid in full to refund¹.

the time of the testator's death, a legatee who has not received payment of his legacy, or who has been compelled to refund, under the last preceding section, cannot oblige one who has received payment in full to refund, whether the legacy were paid to him with or without suit, although the assets have subsequently become deficient by the wasting of the executor.

(Notes).

General.

(1) Corresponding Indian Law.

This section corresponds to S. 322 of the Indian Succession Act, X of 1885. Y

(2) Section copied from Williams.

S. 141 is extracted from Williams' Executors. See II Will. Exors., 10th Ed., 1190. Z

1.—“ When legatee, not satisfied or compelled to refund under S. 140 cannot oblige one paid in full to refund.”

(1) When unsatisfied legatee has a right to demand a refund.

If the assets had become deficient before the satisfied legatee was paid, the unsatisfied legatees may call upon him to refund. See *Peterson v. Peterson*, 3 Eq. 111; *Dowsett v. Culver*, 1892, 1 Ch. 210. A

(2) No right to refund even where subsequent loss of assets is due to accident.

An unsatisfied legatee has no right to compel a refund even where the loss of the assets has occurred, not by the conduct of the executor, but from merely accidental circumstances. *Fenwick v. Clarke*. 31 L.J. Ch. 728, cited in *Ibid*. B

(3) The rule in the section applies to residuary legatees and next-of-kin.

(a) Similarly, where one of several residuary legatees or next-of-kin, has received his share of the estate, the others cannot call upon him to refund if the estate is *subsequently* wasted: but not if the wasting took place before such share was received. II Will. Exors., 10th Ed., 1191. C

(b) In the above cases, the burden of proof lies on those who call upon the residuary legatee or next-of-kin to refund, to show that the wasting took place before the share was paid over. *Ibid.*, citing *Peterson v. Peterson*, 3 Eq. 111. D

(4) “ Assets,” meaning.

As to this, see notes under S. 62, *supra*. E

142. If the assets were not sufficient to satisfy all the legacies at the time of the testator's death, a legatee who has not received payment of his legacy must first proceed against the executor if he is solvent ; but, if the executor is insolvent or not liable to pay, the unsatisfied legatee can oblige each satisfied legatee to refund in proportion. [S. 323.]

When unsatisfied legatee must first proceed against executor, if solvent.

(Notes).

General.

(1) Corresponding Indian Law.

This section corresponds to S. 323 of the Indian Succession Act, X of 1865. F

(2) Section based on Williams.

S. 142 is extracted from Williams' Executors. See II Will. Exors., 10th Ed., 1191 ; citing *Walcot v. Hall*, 1 P. Wms. 495 ; *Gillespie v. Alexander*, 8 Russ. Ch. Cas. 133 ; *David v. Frowd*, 1 M. & K. 200. G

(3) Principle of the section.

The ground of the unsatisfied legatee having to proceed against the executor in the first instance is that the executor, by paying the one legacy, has admitted assets to pay all. (*Ibid.*) H

143. The refunding of one legatee to another shall not exceed the sum by which the satisfied legacy ought to have been reduced if the estate had been properly administered. [S. 324.]

Limit to refunding of one legatee to another.

Illustration.

A has bequeathed 240 rupees to B, 480 rupees to C, and 720 rupees to D. The assets are only 1,200 rupees, and if property administered would give 200 rupees to B, 400 rupees to C, and 600 rupees to D. C and D have been paid their legacies in full, leaving nothing to B. B can oblige C to refund 80 rupees, and D to refund 120 rupees.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 324 of the Indian Succession Act, X of 1865. I

Refunding to be without interest 1.

144. The refunding shall, in all cases, be without interest. [S. 325.]

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 325 of the Indian Succession Act, X of 1865. J

1.—“Refunding to be without interest.”**(1) Ordinarily legatee compelled to refund shall not pay interest.**

If a legacy has been erroneously paid to a legatee, who has no further property in the estate, the legatee, on being compelled to refund, shall not be charged with interest. *Per Lord Eldon in Gittins v. Steele*, 1 Swanst. 200, cited in II Will. Exors., 10th Ed., 1191. **K**

(2) Exception to the above rule in English Law.

But in English Law if the legatee is entitled to another fund making interest in the hands of the Court, justice must be done out of his share by charging interest. (*Ibid.*) **L**

N.B.—No such exception is recognised in S. 144.

[S. 326.]

145. The surplus or residue of the deceased's property, after Residue after usual payments to be paid to residuary legatee ¹. payment of debts and legacies, shall be paid to the residuary legatee when any has been appointed by the will.

(Notes).**General.****(1) Corresponding Indian Law.**

This section corresponds to S. 326 of the Indian Succession Act, X of 1865. **M**

(2) Combined effect of Ss. 117 and 145.

The combined effect of Ss. 117 and 145 is that a residuary legatee becomes entitled to the residue, after the executors have paid the testator's debts and legacies, and that no legatee can insist upon being paid within a year from the testator's death. 7 Bom. L.R. 755 (758). **N**

1.—“Residue after usual payments to be paid to residuary legatee.”**(1) Residuary legatee, how constituted.**

As to this, see notes under S. 19, *supra*. **O**

(2) Property to which residuary legatee entitled.

As to this, see notes under S. 129, *supra*. **P**

(3) “Surplus” and “residue” mean the same.

As to this, see notes under S. 124, *supra*. **Q**

(4) Not necessary that executor should convert all assets into money before residuary can claim his share.

It is not correct to say that an executor must turn all the assets into money before a residuary can call for his share of the residue. *Heirs Hidding v. De Villers*, 12 Ap. Cas. 624. **R**

(5) When the residue becomes “free for enjoyment or divisible.

Where the will is silent, the law says that as soon as on the expiration of “the executor's year,” the executors have liquidated the estate, that is reduced it into possession, and paid the debts and legacies, the residue becomes “free for enjoyment by the heirs” or in other words, “divisible.” Whether it is actually divided or not is immaterial, if it is in a condition to be divided. 7 Bom. L.R. 755 (759); citing *Collison v. Barber*, 12 Ch. D. 834; *Spencer v. Duckworth*, 18 Ch. D. 634. **S**

I.—“Residue after usual payments to be paid to residuary legatee”
—(Concluded).

(6) When a residuary becomes “proprietor” of his legacy.

A residuary legatee does not become “proprietor” until after administration has been completed and the residue ascertained and made over to him. 36 C. 28 (42) = 12 C.W.N. 1065. **T**

(7) General legacies have priority over residuary gift.

(a) As a general rule, the residuary legatee is entitled to nothing, till all the particular legacies given by the will are satisfied in full. Theob., 6th Ed., 811. **U**

(b) So, a residuary legatee cannot call upon particular general legatees to abate. The whole personal estate not specifically bequeathed must be exhausted, before any of these legatees can be obliged to contribute anything out of their bequests. II Will. Exors., 10th Ed., 1088. **Y**

(8) Residuary legatee has no right to call upon general legacies to abate.

(a) A residuary legatee has no right to call upon general legacies to abate. *Purse v. Snaplin*, 1 Atk. 418; *Fomereau v. Poyntz*, 1 Bro. C.C. 478; cited in I Will. Exors., 10th Ed., 1088. **W**

(b) Thus, an annuity must be paid in full before a residuary legacy, unless the annuity is directed to come out of the income of the estate and not out of the corpus. *Croly v. Weld*, 3 De. G.M. & G. 993; cited in I Will. Exors., 10th Ed., 1088. **X**

(9) Annuities have priority over residuary gift.

As to this, see notes under S. 111, *supra*. **Y**

Transfer of assets from British India to executor or administrator in country of domicile for distribution 1.

145-A. Where a person not having his [S. 326-A.] domicile in British India has died leaving assets both in British India and in the country in which he had his domicile at the time of his death,

and there have been a grant of probate or letters of administration in British India with respect to the assets there and a grant of administration in the country of domicile with respect to the assets in that country,

the executor or administrator, as the case may be, in British India, after having given such notices as are mentioned in section 139 and after having discharged, at the expiration of the time therein named, such lawful claims as he knows of,

may, instead of himself distributing any surplus or residue of the deceased's property to persons residing out of British India who are entitled thereto, transfer, with the consent of the executor or administrator, as the case may be, in the country of domicile, the surplus or residue to him for distribution to those persons.

(Old Act).

Act II of 1890 :—S. 16 of this Act inserted, S. 145-A.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 326-A of the Indian Succession Act, X of 1865.

1.—“Transfer of assets from British India to executor or administrator in country of domicile for distribution.”

(1 Domicile—Definition of.

- (a) Domicile is that place in which a person's habitation is fixed without any present intention of removing therefrom. Storey.
- (b) A person's domicile is in general the place or country which is in fact his permanent home, but is in some cases the place or country which, whether it be in fact his home or not, is determined to be his home by a rule of law. Dicey's Conflict of Laws, 2nd Ed., p. 82.
- (c) Domicile is a residence at a particular place accompanied by positive or presumptive proof of an intention to remain there for an unlimited time. Phillimore.
- (d) Domicile is the place of principal establishment. *Code Napoleon* :
- (e) *The idea of domicile comprises :—*
 - (i) The fact of residence in a particular place.
 - (ii) An *animus* or intention of remaining there for an indefinite or unlimited time (*animus manendi*), and
 - (iii) An *animus relinquendi* or intention to abandon a former domicile, whether of origin or of choice.

The domicile whether of birth or of choice of a person is to be ascertained from the physical fact of actual residence and from the surrounding circumstances as to the *animus manendi* (remaining) or *relinquendi* (abandoning). Eversley's Domestic Relations, 3rd Ed., 472.

- (f) *Per* Lord Westbury :—It is a settled principle that no man shall be without a domicile, and to secure this result, the law attributes to every individual as soon as he is born, the domicile of his father, if he is legitimate, and the domicile of the mother, if illegitimate. This is the domicile of origin.

When another domicile is put on, the domicile of origin is, for that purpose relinquished, and remains in abeyance during the continuance of the domicile of choice. It revives and exists whenever there is no other domicile and it does not require to be regained or reconstituted *animus et facto* in the manner which is necessary for the acquisition of a domicile of choice.

Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. There must be a residence freely chosen, and not prescribed or indicated by any external necessity. And it must be residence fixed, not for a limited period, or particular purpose, but general and

1.—“Transfer of assets from British India to executor or administrator in country of domicile for distribution”—(Concluded).

indefinite in its future contemplation. It is true that residence originally temporary or intended for a limited period, may afterwards become general and unlimited, and in such a case, so soon as the change of purpose or *animus manendi* can be inferred, the fact of domicile is established. *Udny v. Udny*, 1869, H.L. Sc. 441. **A**

(2) Matters to be considered in determining a man's domicile.

(a) It is always material in determining what is a man's domicile to consider where his wife and children live and have their permanent place of residence and where his establishment is kept up. *Platt v. Attorney-General of New South Wales*, 3 A.C. 396; cited in II Will. Exors., 10th Ed., 1261 (Notes). **B**

(b) A person who is not bound in duty to live in the capital permanently, but has a residence therein, and also has a mansion house in the country and resides there permanently, and only resorts to the metropolis for any particular purpose shall be considered domiciled in the country. *Somerville v. Somerville*, 5 Ves. 750 (789); cited in II Will. Exors., 10th Ed., 1262 (Notes). **C**

(c) A merchant whose business lies in the metropolis shall be considered as domiciled there, and not at his country residence. *Somerville v. Somerville*, 5 Ves. 750 (759); cited in *Ibid.* **D**

(d) As to how the domicile is determined, when a man has more residences than one, see *Forbes v. Forbes*, Kay. 341; cited in II Will. Exors., 10 Ed., 1266 (n). **E**

(3) Rules of the Indian Succession Act on domicile and its change.

(i) The domicile of origin prevails until a new domicile has been acquired. (S. 9 Act X of 1865.) **F**

(ii) A man acquires a new domicile by taking up his fixed habitation in a country which is not that of his domicile of origin. (S. 10. Act X of 1865.) **G**

(iii) A new domicile continues until the former domicile has been resumed or another has been acquired. (S. 13, Act X of 1865.) **H**

(4) British India, definition.

As to this, see notes under S. 1, *supra*. **H-1**

CHAPTER XIII.

OF THE LIABILITY OF AN EXECUTOR OR ADMINISTRATOR FOR DEVASTATION.

146. When an executor or administrator misapplies the estate of the deceased, or subjects it to loss or damage, he is liable to make good the loss or damage so occasioned. [S. 327.]

Liability of executor or administrator for devastation 1.

Illustrations.

(a) The executor pays out of the estate an unfounded claim. He is liable to make good the loss caused by the payment.

(b) The deceased had a valuable lease renewable by notice, which the executor neglects to give at the proper time. The executor is liable to make good the loss caused by the neglect.

(c) The deceased had a lease of less value than the rent payable for it, but terminable on notice at a particular time. The executor neglects to give the notice. He is liable to make good the loss.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 327 of the Indian Succession Act, X of 1865. I

1.—“*Liability of executor or administrator for devastation.*”

(1) *Devastavit*, defined.

A *devastavit* is a mismanagement of the estate and effects of the deceased, in squandering and misapplying as assets contrary to the duty imposed on them, for which executors or administrators shall answer out of their own pocket as far as they had, or might have had, assets of the deceased. II Will. Exors., 10th Ed., 1434, citing Bac. Abr. J

(2) Principles of liability of executors and administrators for *devastavit*.

The principle on which the liability of executors and administrators for *devastavit* are founded are:—(i) That in order not to deter persons from undertaking these offices, the Court is extremely liberal in making every possible allowance and caution to hold executors and administrators liable on slight ground, and (ii) That care must be taken to guard against an abuse or their trust. II Will. Exors., 10th Ed., 1435. K

(3) *Devastavit* by direct acts of abuse.

A charge of *devastavit* may be incurred by direct acts of abuse; e.g., application of the assets to the satisfaction of the executor's own debt to a third party; collusive sale of the testator's goods at an under-value. II Will. Exors., 10th Ed., 1435: See *Nugent v. Gifford*, 1 Atk. 463; *Scott v. Tyler*, 2 Dick. 725; *Rice v. Gordon*, 11 Beav. 265. L

(4) When a disposing of the assets to the executor's own use is not a *devastavit*.

A disposing of the goods of the testator to the executor's own use is no *devastavit* if he pays the testator's debts to the value, with his own money, in such order as the law appoints. *Merchant v. Driver*, 1 Saund. 307. M

(5) *Devastavit* by mal-administration.

A charge of *devastavit* may be incurred by mal-administration, e.g., misapplication of assets in undue expenses for the funeral; payment of debts out of legal order; assent to or payment of a legacy where there is no fund sufficient for creditors. II Will. Exors., 10th Ed., 1436. See *Handcock v. Podmore*, 1 B. & A. 260. N

(6) Liability for improper distribution of assets.

An administrator who pays such debts as he knows of otherwise than equally and rateably as far as the assets of the deceased will extend as

1.—“*Liability of executor or administrator for devastation*”—(Continued).

required by S. 104, is *personally* liable for any loss occasioned to a creditor of the deceased by such improper distribution of the assets. In order to charge such administrator, his knowledge must be actual, as distinguished from a constructive or imputable knowledge. 8 B.H. C.R. o.c. 20. O

(7) *Devastavit by loss of the assets.*

- (a) An executor or administrator stands in the condition of a gratuitous bailee, with respect to whom the law is, that he shall not be charged without some default in him. II Will. Exors., 10th Ed., 1290, 1443. P
- (b) Thus, if any of the assets are stolen from the possession of an executor or that of a third person, to whose custody they have been delivered by the executor, or are lost by casualty, as by accidental fire, the executor is not liable, if he has taken all reasonable care and there has been no wilful default on his part. (*Ibid.*) citing *Jones v. Lewes*, 2, Ves. Sen. 240; *Brown v. Sewell*, 11 Hare, 52. Q
- (c) According to Henderson, there is nothing in the Indian Acts to militate against that rule being applied to India. Hend. 3rd Ed., 370. R

(8) *Liability for loss by loans on personal security.*

- (a) If an executor or administrator, lends money of the deceased upon bond, promissory note, or other personal security, he is guilty of a breach of trust, for which he is *personally* liable, if the security prove defective. II Will. Exors., 10th Ed., 446, and see cases therein cited. S
- (b) But, if the will directs the executor to lay out money in real or *personal* securities he would be justified, *as against legatees* though not as *against creditors*, using a sound discretion, and fairly and honestly lending it to a person whom he considered responsible, at a reasonable interest. *Forbes v. Rees*, 2 Cox. 116, *Doyle v. Blake*, 2 Ch. & Lef. 289. T

(9) *Loan to co-executor on personal security is a breach of trust.*

A loan to a co-executor on his personal security is a breach of trust, *Walker's case*, 5 Russ. 7; *Gladow v. Atkin*, 2 Cr. & J. 548. U

(10) *Liability for investing in unauthorised securities.*

- (a) If an executor invest the money of the estate in unauthorised investments, which afterwards sink in value, the loss must be borne by him, though there be no *mala fides* on his part. *Hancox v. Allen*, 2 Dick. 498; *Howe v. Lord Dartmouth*, 7 Ves. 150; *Clough v. Bond*, 3 My. & Cr. 497. Y
- (b) An executor bound to invest trust monies in authorized securities is *prima facie* answerable for the proper care and custody of such monies until they are actually so invested; and will not be exonerated from liability, if, in the meantime, he leave them in other hands. II Will. Exors., 10th Ed., 1463; citing *Clough v. Bond*, 3 My. & Cr. 496. W

(11) *Liability for mixing funds of the estate with administrator's own and employing them for his own purposes.*

It is a serious breach of the plainest duty of an administrator to mix the funds of an estate with his own, and employ them for his own purposes for which he is in great danger of criminal as well as civil liability. 6 C. 70 (76)=7 C.L.R., 26. X

1.—“*Liability of executor or administrator for devastation*”—(Continued).(12) *Liability of executor for property in his possession unaccounted for.*

An executor is liable to be charged with the value property which he is proved to have possessed himself and which is not forthcoming and accounted for. 4 W.R.P.O. 106. Y

(13) *Liability of executor for loss by agent's default.*

(a) If an executor improperly appoint another to receive the money of the testator, and that person makes default, this is a *devastavit*. *Jenkins v. Plombe*, 6 Mod. 93. Z

(b) In the appointment of an agent to carry on business it is incumbent on an executor to act with the same degree of care as a man of ordinary prudence would in his own affairs. But where there is want of diligence on the part of the executor both in the selection and the supervision of the agent, and the loss sustained by the agent can reasonably be connected with the want of such diligence, the loss must fall on the executor. 29 B. 170=6 Bom. L.R. 907. A

(c) But, if the defaulting agent was properly employed in the ordinary course of business, the executor is not liable. *Speight v. Gaunt*, 6 Ap. Cas. 1; *Re Brier*, 26 Ch. D. 238. B

14) *Liability for failure of banker.*

Where money deposited with a banker is lost by his failure, the executor is not liable if the deposit was made from necessity or conformably to the common usage of mankind. II Will. Exors., 10th Ed., 1461; citing *Bacon v. Bacon*, 5 Ves. 334; *Edmonds v. Peake*, 7 Beav. 239; *Drake v. Martyn*, 1 Beav. 525; *Challen v. Shippam*, 4 Hare, 555. C

Liability of executor for devastavit of co-executor.) *Act is silent on the subject.*

The Act is silent as to whether one executor is liable for *devastation* by his co-executor. Ph. & Trev. 431. D

(2) *Principles of such liability.*

(i) An executor is not, under ordinary circumstances liable for the assets come to the hands of his co-executor. II Will. Exors., 10th Ed., 1467; see *Longford v. Gascoyne*, 11 Ves. 433. E

(ii) A *devastavit* by one of two executors or administrators will not charge his companion, provided he has not intentionally or otherwise contributed to it. 3 Ind. Cas. 247. F

(iii) An executor would not be liable for the *devastation* of his co-executor unless it could be shown that he has directly or indirectly contributed to it, or that being cognizant of it, he took no steps to prevent a loss to the estate. Ph. and Trev. 431, citing *Coryton* 97. G

(iv) But, where, by any act done by one executor, any part of the estate comes to the hands of his co-executor, the former would be answerable for the latter, in the same manner as he would have been for a stranger, whom he had entrusted to receive it. (*Ibid.*), 1468; see *Hewitt v. Foster*, 6 Beav. 259. H

(v) An executor who unnecessarily does an act by which his co-executor obtains sole possession of a part of the estate is liable for the co-executor's misapplication of it. *Re Gasquaigne*, 1894, 1 Ch. 470. I

I.—“ Liability of executor or administrator for devastation ”—(Concluded).

Liability of executor for devastation of co-executor—(Concluded).

- (vi) An executor having a fund standing in the joint names of himself and another, cannot, upon the mere representation of the co-executor, be justified in doing, without further inquiry, an act that is an exercise of power over that fund. *Shipbrook v. Lord Hinclinbrook*, 16 Ves. 477. J
- (vii) But one executor is not answerable for the receipt of the other, merely by taking probate, permitting the other to possess the assets, and joining in acts necessary to enable him to administer. *Hovey v. Blakeman*, 4 Ves. 596. K
- (viii) An executor who stands by and sees a breach of trust committed by his co-executor, is equally liable. *Styles v. Guy*, 1 Mac. & G. 438; *Williams v. Nixon*, 2 Beav. 475; *Horton v. Broklehurst*, 29 Beav. 510; *Booth v. Booth*, 1 Beav. 125. L
- (ix) Where a testator by his will committed the management of the property to his widow along with two out of five executors including the widow, it is not open to one of the executors who was not specifically entrusted with the management to contend for the purpose of avoiding liability as executor, that his duties were purely advisory, that he was but one of many, that votes of the majority of executors governed, and that the real management was entrusted to two out of the executors in co-operation with the widow. 29 B. 170 = 6 Bom. L. R. 907. M

Miscellaneous.

- (1) **Suit for administration complaining of various acts of mal-administration is not bad for multifariousness.**

In a suit for administration of the assets of a deceased person, where various dealings by the executors are complained of as acts of mal-administration and sought to be redressed, they do not constitute separate causes of action so as to make the suit multifarious. 26 C. 891 = 3 C. W.N. 670. N

- (2) **Concurrence or acquiescence of beneficiary, to what extent will exonerate executor.**

Although concurrence in a *devastavit* by the parties injured by it or acquiescence by them, will relieve the executor, yet the Court must inquire into all the circumstances of the case and ascertain whether there was really such concurrence or acquiescence as ought to relieve the executors. *Davies v. Hodgson*, 25 Beav. 177; *Re Baker*, 20 Ch. D. 230; *Dixon v. Dixon*, 9 Ch. D. 587; *Re Hulkes*, 33 Ch. D. 552, *cited in* *Hend.*, 3rd Ed., 371. O

- (3) **How far executor can carry on testator's business.**

Although an executor cannot, unless authorised by the will, carry on the business of his testator, he may do so for the purpose of winding it up. *Collinson v. Lister*, 20 Beav 356. P

- (4) **Hindu executor not competent to revive barred debt by acknowledgment.**

As to this, see notes under S. 104, *supra*.

Miscellaneous—(Concluded).

- (5)
- Hindu executor not competent to give a new contract for a barred debt.**

As to this, see notes under S. 104, *supra*.

R

- (6)
- Executor cannot pay a debt judicially declared to be time-barred.**

As to this, see notes under S. 104, *supra*.

S

- (7)
- Executor cannot pay a debt which is not enforceable under the Statute of Frauds.**

As to this, see notes under S. 104, *supra*.

T

- (8)
- No increase of liability on ground of payment of remuneration.**

The liability of an executor is not increased by the fact of his being remunerated for his services. *Jobson v. Palmer*, 1898, 1 Ch. 71.

U

- (9)
- Executor's remuneration.**

As to this, see notes under Ss. 6 and 102, *supra*.

Y

147. When an executor or administratorfor neglect to get
in any part of pro-
perty.occasions a loss to the estate by neglecting to get
in any part of the property of the deceased, he is
liable to make good the amount.**Illustrations.**

(a) The executor absolutely releases a debt due to the deceased from a solvent person, or compounds with a debtor who is able to pay in full. The executor is liable to make good the amount so lost.

(b) The executor neglects to sue for a debt till the debtor is able to plead the Act for the limitation of suits, and the debt is thereby lost to the estate. The executor is liable to make good the amount of the debt.

(Notes).**General.****Corresponding Indian Law.**

This section corresponds to S. 328 of the Indian Succession Act, X of 1865. W

1.—“Liability of executor or administrator for neglect to get in any part of property.”

- (1)
- Devastavit by negligence.**

Such acts of negligence or careless administration, as defeat the rights of creditors or legatees or parties entitled in distribution, amount to a *devastavit*. II Will. Exors., 10th Ed., 1441.

X

- (2)
- Duty of executor to convert unauthorised investment into authorised ones.**

If a testator die leaving investments unauthorised by statute, without specifically bequeathing them, the executor, is bound, in the absence of express authority in the will to retain the same, to convert them and invest the proceeds in the authorised investments. II Will. Exors., 10th Ed., 1448, 1449.

Y

- (3)
- Authorised investments, what are.**

(a) As to what are authorised investments in English Law, see the English Trustee Act, 1893.

Z

(b) As to what are authorised investments in Indian Law, see S. 20 of the Indian Trusts Act, II of 1882.

A

1.—“Liability of executor or administrator for neglect to get in any part of property”—(Continued).

(4) Liability for retaining money directed to be invested.

(a) Where an executor directed by the will to invest the money in the funds, retains the money, in his own hands or invests it upon insufficient security, the beneficiary may elect to charge him either with the amount of the money or with the amount of the stock which he might have purchased with the money. *Shepherd v. Moulds*, 4 Hare 503; *Pride v. Fooks*, 2 Bead. 430, cited in II Will. Exors., 10th., Ed., 1457. **B**

(b) If in the above case, the executor has been given a discretion to invest the money in various ways, he is liable, in event of failure to invest, only for the whole amount of the fund with interest, but not for the value of some particular security that might have been obtained. *Robinson v. Robinson*, 1 De. Gex. M. & G. 247. **C**

(5) Liability for retaining investments directed to be converted.

As to this, see notes under S. 126, *supra*. **D**

(6) Liability for permitting money to remain on personal security.

(a) An executor cannot, without great reason, permit money to remain upon personal security longer than is absolutely necessary. *Powell v. Evans*, 5 Ves. 839. **E**

(b) So, where for more than three years, an executor permitted money to remain due on bond to his testator, without inquiring into the situation and circumstances of the obligor, or calling upon him to pay in the money, the executor was held liable on the obligor becoming bankrupt. *Powell v. Evans*, 5 Ves. 832, cited in *Ibid.* 1443. **F**

(7) No absolute limit of time for getting in the assets.

The Court always allows a reasonable discretion to the executor as to the time within which the assets of the testator should be got in; there is no inflexible rule that he should do so within a year. Every case is governed by its own circumstances. *Hughes v. Empson*, 22 Beav. 181; *Marsden v. Kent*, 5 Ch. D. 598; *Re Chapman*, 1896, 2 Ch. 763. **G**

(8) Liability for giving up rights under compromise.

An administrator who gave up his right to a sum of money under a compromise entered into by him was held liable in a suit by a creditor of the deceased for the loss to the estate caused by such default. 17 B. 637. **H**

(9) Liability for delaying payment of debt carrying interest.

If an executor delays the payment of a debt payable on demand with interest, and suffers judgment for the principal and interest incurred after the testator's death, this is a *devastavit* for the interest, unless the executor can show that the assets were insufficient to discharge the debt immediately. *Seaman v. Everard*, 2 Lev. 40, cited in II Will. Exors., 10th Ed., 1442. **I**

(10) Liability for unduly delaying to bring action.

As to this, see notes under S. 100, *supra*. See also Illus. (b). **J**

1.—“Liability of executor or administrator for neglect to get in any part of property”—(Concluded).

(11) Illustration (b).

Illustration (b) to S. 147 is taken from the English case of *Hayward v. Kinsey*, 12 Mod. 573. K

(12) Liability for leaving debt outstanding from co-executor.

As to this, see notes under S. 100, *supra*. L

(13) Liability for interest of executor omitting to lay out money.

Under English Law an executor guilty of negligence in omitting to lay out the money for the benefit of the estate is liable to be charged with interest on such money at 3 per cent. II Will. Exors., 10th Ed., 1489, 490. M

(14) Liability for interest of executor using the money for his own purposes.

(a) Where he himself has made use of the money or has committed some other *misfeasance*, to his own profit and advantage, the executor is liable to be charged with interest at the rate of 5 per cent. *Ibid*, 1491. N

(b) And if the money has been employed in trade the beneficiary has an option of taking either such interest or the *profits* earned. (*Ibid*.) O

(c) In a strong case of violation of duty, an executor may be charged with *compound interest*. *Crackett v. Bethune*, 1 Jac. & Walk 586; *Jebbs v. Carpenter*, 1 Madd. 290. P

(15) No liability for not insuring.

An executor is not bound to insure or continue an insurance effected by the testator. *Fry v. Fry*, 27 Beav. 146; *Re Fowler*, 16 Ch. D. 723. Q

(16) No liability for neglect to take out probate.

No action lies for neglect to take out probate, though such neglect has been followed by loss. *Per Williams, L.J.* in *Re Stevens*, 1898, 1 Ch. 162 (177). R

(17) No liability where will misleading.

An executor is not liable for *devastavit* if the will he has to administer is so framed as to mislead him and he is not called upon by any party interested under the will to act differently from his own view. 2 Hyde 3. S

(18) Acting under legal advice, no justification.

Acting under legal advice is no protection to an executor or administrator in respect of his liability for wrongful acts. *Doyle v. Blake*, 2 Sch. & Lef. 343; *Re Knight's Trusts*, 29 Beav. 49. T

(19) Right of recovery of succeeding administrator against his predecessor or his representatives for *devastavit*.

A successor in administration is entitled to recover against his predecessor or predecessor's representatives for any *devastavit* or mal-administration. 9 C.L.J. 383 (405), *Per Mukerjee, J.* U

CHAPTER XIV.

MISCELLANEOUS.

Provisions applied
to administrator
with will annexed.
Saving-clause.

148 In Chapters VIII, IX, X and XII of [Nil.] this Act the provisions as to an executor shall apply also to an administrator with the will annexed.

149. Nothing herein contained shall— [Nil.]

- (a) validate any testamentary disposition which would otherwise have been invalid ;
- (b) invalidate any such disposition which would otherwise have been valid ;
- (c) deprive any person of any right of maintenance to which he would otherwise have been entitled ; or
- (d) affect the rights, duties and privileges of the Administrator-General of Bengal, Madras or Bombay.

N.B.—For the duties and privileges of the Administrator-General, [see Act II of 1874 and Act IX of 1881.

Probate and administration in case of persons exempted from Succession Act, to be granted only under this Act.

150. No proceedings to obtain probate of a [Nil.] will, or letters of administration to the estate, of any Hindu, Muhammadan, Buddhist or person exempted under section 332 of the Indian Succession Act, 1865 ¹ shall be instituted in any Court in British India except under this Act.

(Notes).

I.—“ *Any Hindu, Muhammadan, Buddhist or person exempted under S. 332 of the Indian Succession Act, 1865.*”

- (1) **Meaning of expression “Hindu, Muhammadan, Buddhist.”**

As to this, see notes under S. 2, *supra*.

Y

- (2) **Person exempted under S. 332 of the Succession Act.**

As to this, see notes under S. 2, *supra*.

W

151. [*Repeal of portions of Act XXVII of 1860.*] *Repealed by Act VII of 1889.*

152. The grant of probate or letters of administration under [Nil.] this Act in respect of any property shall be deemed to supersede any certificate previously granted in respect of the same property under Act No. XXVII of 1860, or Bombay Regulation No. VIII of 1827 ¹ ; and when, at the time of the grant of such probate or letters, any suit or other proceeding instituted by the holder of such certificate regarding such

Grant of probate or administration to supersede certificate under Act XXVII of 1860 or Bombay Regulation VIII of 1827.

property is pending, the person to whom such grant is made shall, on applying to the Court in which such suit or proceeding is pending, be entitled to take the place of such holder in such suit or proceeding :

Provided that, when any certificate is superseded under this section, all payments made to the holder of such certificate in ignorance of such supersession shall be held good against claims under the probate or letters of administration.

(Old Acts).

Act XII of 1891 :—This Act repealed the words “the said ” before the words “Act No. XXVII of 1860 ” in S. 152.

(Notes).

I.—“Any certificate previously granted....under Act No. XXVII of 1860, or Bombay Regulation No. VIII of 1827.”

(1) Act XXVII of 1860 has been repealed by Act VII of 1889.

Act XXVII of 1860 has been repealed by the Succession Certificate Act, VII of 1889. And see S. 2 (3), Act VII of 1889. **X**

(2) Certificates under Bombay Regulation VIII of 1827.

As to certificates granted under Bombay Regulation No. VIII of 1827, see S. 23, Act VII of 1889. **Y**

153. [*Amendment of Court-fees Act.*] *Repealed by the Succession Certificate Act (VII of 1889).*

[*N&L.*]

Amendment of Hindu Wills Act 1870 1.	154. The following amendments shall be made in the Hindu Wills Act, 1870 (namely) :—
--	---

- (a) for the portion of section 2 commencing with the words “sections one hundred and seventy-nine” and ending with the words “administrator with the will annexed,” the words “and section one hundred and eighty-seven” shall be substituted ;
- (b) the third clause of section 3 and the last clause of section 6 shall be repealed ;
- (c) in section 6, for the words “one hundred and three and one hundred and eighty-two” the words “and one hundred and three” shall be substituted.

(Notes).

I.—“*Amendment of Hindu Wills Act, 1870.*”

Effect of the amendment of the Hindu Wills Act.

- (a) The effect of the amendment of the Hindu Wills Act provided by S. 154 is to make the provisions of the Indian Succession Act with respect to the grant of probate of wills and letters of administration to the estates of deceased Hindus, Jainas, Sikhs and Buddhists in the Lower Provinces of Bengal and in the towns of Madras and Bombay where such wills were made subsequent to the 1st September, 1870, or where such persons died after that date, inapplicable, and at the same time to leave the executor or legatee of such persons under the obligation of obtaining probate or letters of administration from a competent Court before his rights as such executor or legatee could be established in a Court of Justice. *Per Norris, J.*, in 14 C. 37 (40). Z
- (b) See, also, 8 B. 241 *cited* under S. 12, *supra*. A

155. All grants of probate of the will or letters of administration to the estate of any deceased Hindu, Muhammadan or Buddhist, or any person exempted under section 332 of the Indian Succession Act, 1865, which, before this Act comes into force, have been made in British Burma, shall, whenever such grant would have been lawful if this Act had been in force, be deemed to have been made in accordance with law. [N^ol.]

Validation of grants of probate and administration made in British Burma.

(Notes).

General.

Object of the section.

- (a) S. 155 was intended to remove all doubt as to the validity of certain grants of probate and administration made in British Burma. See Statement of objects and Reasons, dated 16th May, 1879.
- (b) See, also, S. 24, Act VII of 1889.

156. [*Amendment of Limitation Act, 1877 (XV of 1877).*] *Repealed by the Indian Limitation Act, 1908 (IX of 1908).*

157. (1) When a grant of probate or letters of administration is revoked or annulled under this Act, the person to whom the grant was made shall forthwith deliver up the probate or letters to the Court which made the grant. [S. 333.]

Surrender of revoked probate or letters of administration 1.

(2) If such person wilfully and without sufficient cause omits so to deliver up the probate or letters, he shall be punished with fine which may extend to one thousand rupees, or with imprisonment which may extend to three months, or with both.

(Old Acts).

Act VI of 1889 :—S. 17 of this Act newly added S. 157.

(Notes).

General.

Corresponding Indian Law.

This section corresponds to S. 333 of the Indian Succession Act, X of 1865. B

1.—“*Surrender of revoked probate or letters of administration.*”

(1) English practice as to surrender of revoked grant.

(a) From a just reluctance to leave a revoked grant in the hands of its grantee (possibly an unscrupulous person), the Court requires it to be produced and delivered to the Registrar at the time of its revocation, so that it may be afterwards cancelled in the registry. Trist. & Coote, 13th Ed., 194. C

(b) If the proceeding be compulsory, i.e., by citation of the party, he should bring it into the registry, or suffer the penalty of his contempt. (*Ibid.*) D

(2) Second grant of probate of administration without revoking the first when allowed.

As to this, see notes under S. 50, *supra*. E

(3) When the English Court will make a subsidiary grant without revoking original grant.

As to this, see notes under S. 50, *supra*. F

(4) Procedure upon revocation of lost letters of administration.

As to this, see notes under S. 50, *supra*. G

(5) A revoked grant may be allowed to remain with solicitor having a lien.

A revoked grant of administration has been allowed to remain in the hands of the solicitors of the administrator, who had a lien upon it. *Barnes v. Durham*, 1 P. and M. 729, cited in Trist and Coote, 13th Ed., 195. H

(6) Practice on application for *de bonis non* grant.

On an application for grant *de bonis non*, the practice is to annex the original grant to such application. Hend. 3rd Ed., 375. I

APPENDIX.

Extracts from English Statutes relating to grant of probate and letters of administration, with corresponding references to the Probate and Administration Act.

N.B.—Such sections as appear to have no bearing on the interpretation of the Probate and Administration Act are omitted.

COURT OF PROBATE ACT, 1857.

(20 & 21 VICT. C. 77).

XXV. The Court of Probate shall have the like powers, jurisdiction, and authority for enforcing the attendance of persons required by it as aforesaid and for punishing persons failing, neglecting, or refusing to produce deeds, evidences, or writings, or refusing to appear or to be sworn, or make affirmation or declaration, or to give evidence, or guilty of contempt, and generally for enforcing all orders, decrees, and judgments made or given by the Court under this Act, and otherwise in relation to the matters to be inquired into and done by or under the orders of the Court under this Act, as are by law vested in the High Court of Chancery for such purposes in relation to any suit or matter depending in such Court. [Repealed by S. 3, St. 44 and 45 Vict., C. 59.]

Compare, S. 53 of the Probate and Administration Act.

XXVI. The Court of Probate may, on motion or petition, or otherwise, in a summary way, whether any suit or other proceeding shall or shall not be pending in the Court with respect to any probate or administration, order any person to produce and bring into the principal or any district registry, or otherwise as the Court may direct, any paper or writing being or purporting to be testamentary, which may be shown to be in the possession or under the control of such person; and if it be not shown that any such paper or writing is in the possession or under the control of such person, but it shall appear that there are reasonable grounds for believing that he has the knowledge of any such paper or writing, the Court may direct such person to attend for the purpose of being examined in open Court, or upon interrogatories respecting the same; and such person shall be bound to answer such questions or interrogatories, and, if so ordered, to produce and bring in such paper or writing, and shall be subject to the like process of contempt in case of default in not attending or in not answering such questions or interrogatories, or not bringing in such paper or writing, as he would have been subject to in case he had been a party to a suit in the Court and had made such default; and the costs of any such motion, petition, or other proceeding shall be in the discretion of the Court.

Compare, S. 54 of the Probate and Administration Act.

XLVI. Probate of will or letters of administration may, upon application for that

Probates and administration may be granted in common form by district registrars, if it shall appear by affidavit that the testator, etc., had a fixed place of abode.

purpose to the district registry, be granted in common form by the district registrar in the name of the Court of Probate and under the seal appointed to be used in such district registry, if it shall appear by affidavit of the person or some or one of the persons applying for the same that the testator or intestate, as the case may be, at the time of his death had a fixed place of abode within the district in which the application is made, such place of abode being stated in the affidavit; and such probate or letters of administration shall have effect over the personal estate of the

deceased in all parts of England accordingly.

Compare, S. 56 of the Probate and Administration Act.

XLVII. Such affidavit shall be conclusive for the purpose of authorising the grant, by the District Registrar, of probate or administration; and no

Affidavit to be conclusive for authorising grant of Probate.

such grant of probate or administration shall be liable to be recalled, revoked, or otherwise impeached by reason that the testator or intestate had no fixed place of abode within the district at the time of his death; and every probate and administration

granted by any such District Registrar shall effectually discharge and protect all persons paying to or dealing with any executor, or administrator thereunder, notwithstanding the want of or defect in such affidavit, as is hereby required.

Compare, S. 61 of the Probate and Administration Act.

District Registrars, not to make grants where there is contention, etc.

XLVIII. The District Registrar shall not grant probate or administration in any case in which there is contention as to the grant, until such contention is terminated or disposed of by decree or otherwise or in which it otherwise appears to him that probate or administration ought not to be granted in common form.

Compare, S. 73 of the Probate and Administration Act

L. In every case where it appears to a District Registrar that it is doubtful whether the probate or letters of administration which may be applied

District Registrar, in case of doubt as to grant, to take the directions of the Judge.

for should or should not be granted, or where any question arises in relation to the grant, or application for the grant, of any probate or administration, the District Registrar shall transmit a statement of the matter in question to the registrars of the Court of Probate, who shall obtain the directions of the

Judge in relation thereto; and the Judge may direct the District Registrar to proceed in the matter of the application according to such instructions as to the Judge may seem necessary, or may forbid any further proceeding by the District Registrar in relation to the matter of such application, leaving the party applying for the grant in question to make application to the Court of Probate through its principal registry, or, if the case be within its jurisdiction, to a county court.

Compare, S. 74 of the Probate and Administration Act.

LII. Every District Registrar shall file and preserve all original wills of which probate or letters of administration with the will annexed may be

District Registrars to preserve original wills.

granted by him, in the public registry of the district, subject to such regulations as the Judge of the Court of Probate may from time make in relation to the due preservation thereof, and the

convenient inspection of the same.

Compare, S. 81 of the Probate and Administration Act.

LIII. Caveats against the grant of probates or administrations may be lodged in the principal registry or in any district registry; and subject to any Rules or Orders under this Act, the practice and procedure under such caveats in the Court of Probate shall, as near as may be, correspond with the practice and procedure under caveats now in use in the Prerogative Court of Canterbury; and immediately upon a caveat being lodged in any district registry, the District Registrar shall send a copy thereof to the registrars to be entered among the caveats in the principal registry; and immediately upon a caveat being entered in the principal registry, notice thereof shall be given to the District Registrar of the district, if any, in which it is alleged the deceased resided at the time of his decease, and to any other District Registrar to whom it may appear to the Registrar of the principal registry expedient to transmit the same.

Compare, S. 70 of the Probate and Administration Act.

LXI. Where proceedings are taken under this Act for proving a will in solemn form, or for revoking the probate of a will, on the ground of the invalidity thereof, or where in any other contentious cause or matter under this Act the validity of a will is disputed, unless in the several cases aforesaid the will affects only personal estate, the heir-at-law, devisees and other persons having or pretending interest in the real estate affected by the will shall, subject to the provisions of this Act, and to the Rules and Orders under this Act, be cited to see proceedings, or otherwise summoned in like manner as the next-of-kin or others having or pretending interest in the personal estate affected by a will should be cited or summoned, and may be permitted to become parties or intervene for their respective interests in such real estate, subject to such Rules and Orders, and to the discretion of the court.

Compare, S. 69 of the Probate and Administration Act.

LXII. Where probate of such will is granted after such proof in solemn form or where the validity of the will is otherwise declared by the decree or order in such contentious cause or matter as aforesaid, the probate, decree, or order respectively shall enure for the benefit of all persons interested in the real estate affected by such will; and the probate copy of such will, or the letters of administration with such will annexed, or a copy thereof respectively, stamped with the seal of Her Majesty's Court of Probate, shall in all courts, and in all suits and proceedings affecting real estate, of whatever tenure (save proceedings by way of appeal under this Act, or for the revocation of such probate or administration), be received as conclusive evidence of the validity and contents of such will, in like manner as a probate is received in evidence in matters relating to the personal estate; and where probate is refused or revoked, on the ground of the invalidity of the will, or the invalidity of the will is otherwise declared by decree or order under this Act, such decree or order shall enure for the benefit of the heir-at-law or other persons against whose interest in real estate such will might operate; and such will shall not be received in evidence in any suit or proceeding and relation to real estate, save in any proceeding by way of appeal from such decrees or orders.

Compare, S. 59 of the Probate and Administration Act.

XLVI. Probate of will or letters of administration may, upon application for that purpose to the district registry, be granted in common form by the district registrar in the name of the Court of Probate and under the seal appointed to be used in such district registry, if it shall appear by affidavit of the person or some or one of the persons applying for the same that the testator or intestate, as the case may be, at the time of his death had a fixed place of abode within the district in which the application is made, such place of abode being stated in the affidavit; and such probate or letters of administration shall have effect over the personal estate of the deceased in all parts of England accordingly.

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District Registrars, not to make grants where there is contention, etc.

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Compare, S. 74 of the Probate and Administration Act.

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Compare, S. 81 of the Probate and Administration Act.

District Registrars to preserve original wills.

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Compare, S. 70 of the Probate and Administration Act.

LXI. Where proceedings are taken under this Act for proving a will in solemn form, or for revoking the probate of a will, on the ground of the invalidity thereof, or where in any other contentious cause or matter under this Act the validity of a will is disputed, unless in the several cases aforesaid the will affects only personal estate, the heir-at-law, devisees and other persons having or pretending interest in the real estate affected by the will shall, subject to the provisions of this Act, and to the Rules and Orders under this Act, be cited to see proceedings, or otherwise summoned in like manner as the next-of-kin or others having or pretending interest in the personal estate affected by a will should be cited or summoned, and may be permitted to become parties or intervene for their respective interests in such real estate, subject to such Rules and Orders, and to the discretion of the court.

Compare, S. 69 of the Probate and Administration Act.

LXII. Where probate of such will is granted after such proof in solemn form or where the validity of the will is otherwise declared by the decree or order in such contentious cause or matter as aforesaid, the probate, decree, or order respectively shall enure for the benefit of all persons interested in the real estate affected by such will ; and the probate copy of such will, or the letters of administration with such will annexed, or a copy thereof respectively, stamped with the seal of Her Majesty's Court of Probate, shall in all courts, and in all suits and proceedings affecting real estate, of whatever tenure (save proceedings by way of appeal under this Act, or for the revocation of such probate or administration), be received as conclusive evidence of the validity and contents of such will, in like manner as a probate is received in evidence in matters relating to the personal estate ; and where probate is refused or revoked, on the ground of the invalidity of the will, or the invalidity of the will is otherwise declared by decree or order under this Act, such decree or order shall enure for the benefit of the heir-at-law or other persons against whose interest in real estate such will might operate ; and such will shall not be received in evidence in any suit or proceeding and relation to real estate, save in any proceeding by way of appeal from such decrees or orders.

Compare, S. 59 of the Probate and Administration Act.

LXVI. There shall be one place of deposit under the control of the Court of probate, at such place in London or Middlesex as Her Majesty may by Order in Council direct, in which all the original wills brought into the Court or of which probate or administration with the will annexed is granted under this Act in the principal registry thereof, and copies of all wills the originals whereof are to be preserved in the distinct registries, and such other documents as the Court may direct, shall be deposited and preserved, and may be inspected under the control of the Court and subject to the Rules and Orders under this Act.

Compare, S. 81 of the Probate and Administration Act.

LXX. Pending any suit touching the validity of the will of any deceased person, or for obtaining, recalling, or revoking any probate or any grant of administration, the Court of Probate may appoint an administrator of the personal estate of such deceased person; and the administrator so appointed shall have all the rights and powers of a general administrator, other than the right of distributing, the residue of such personal estate; and every such administrator shall be subject to the immediate control of the Court, and act under its direction.

Administration
pendente lite.
(Amended by "Court
of Probate Act,
1858" S. 22.)

Compare, S. 34 of the Probate and Administration Act.

LXXIII. Where a person has died or shall die wholly intestate as to his personal estate, or leaving a will affecting personal estate, but without having appointed an executor thereof willing and competent to take probate, or where the executor, shall at the time of the death of such person be resident out of the United Kingdom of Great Britain and Ireland, and it shall appear to the Court to be necessary or convenient in any such case, by reason of the insolvency of the estate of deceased, or other special circumstances, to appoint some person to be the administrator of the personal estate of the deceased, or of any part of such personal estate, other than the person who, if this Act had not been passed, would by law have been entitled to a grant of administration of such personal estate, it shall not be obligatory upon the Court to grant administration of the personal estate of such deceased person to the person who, if this Act had not passed, would by law have been entitled a grant thereof, but it shall be lawful for the Court, in its discretion, to appoint such person as the Court shall think fit to be such administrator upon his giving such security (if any) as the Court shall direct; and every such administration may be limited as the court shall think fit.

Compare, S. 41 of the Probate and Administration Act.

LXXIV. The provisions of an Act passed in the thirty-eighth year of his late Majesty King George the Third, chapter eighty-seven,—relating to grants limited for purpose of proceedings in equity shall—apply (in like manner) to all cases where letters of administration have been granted, and the person to whom such administration shall have been granted shall be out of the jurisdiction of her Majesty's Courts of law and equity.

88 Geo. 3, C. 87,
extended to adminis-
trators. (Amended
by "Court of Pro-
bate Act, 1858"
S. 18.)

Compare, S. 39 of the Probate and Administration Act.

LXXV. After any grant of administration, no person shall have power to sue or prosecute any suit or otherwise act as executor of the deceased, as to the personal estate comprised in or affected by such grant of administration until such administration shall have been recalled or revoked.

After grant of ad-
ministration no per-
son to have power to
sue as an executor.

Compare, S. 82 of the Probate and Administration Act.

LXXVII. Where any probate or administration is revoked under this Act,

Payments, under
revoked probates or
administration to be
valid.

payments *bona fide* made to any executor or administrator under such probate or administration, before the revocation thereof, shall be a legal discharge to the person making the same; and the executor or administrator who shall have acted under any such revoked probate or administration may retain and reimburse himself in respect of any payments made by him which the person to whom probate or administration shall be afterwards granted might have lawfully made.

Compare, S. 84 of the Probate and Administration Act.

LXXVIII. All persons and corporations making or per-

Persons, etc., mak-
ing payment upon
probates granted for
estate of deceased
person to be indem-
nified.

mitting to be made any payment or transfer *bona fide*, upon any probate or letters of administration granted in respect of the estate of any deceased person under the authority of this Act, shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of such probate or letters of administration.

Compare, S. 84 of the Probate and Administration Act.

LXXIX. Where any person, after the commencement of this Act, renounces probate of the will of which he is appointed executor or one of the executors, the rights of such person in respect of the executorship shall wholly cease; and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor.

Rights of an exe-
cutor renouncing
probate to cease as if
he had not been
named in the will.
(Amended by "Court
of Probate Act,
1858," S. 16.)

Compare, S. 17 of the Probate and Administration Act.

LXXXI. Every person to whom any grant of administration shall be committed

Person to whom
grant of adminis-
trations shall be
committed shall
give bond.

shall give bond to the Judge of the Court of Probate to enure for the benefit of the Judge for the time being, and, if the Court of Probate or (in the case of a grant from the district registry) the District Registrar shall require, with one or more surety or sureties, conditioned for duly collecting, getting in, and administering the personal estate of the deceased, which bond shall be in such form as the Judge shall from time to time by any general or special order direct: Provided that it shall not be necessary for the solicitor for the affairs of the Treasury or the solicitor of the Duchy of Lancaster applying for or obtaining administration to the use or benefit of Her Majesty to give any such bond as aforesaid.

Compare, S. 78 of the Probate and Administration Act.

LXXXII. Such bond shall be in a penalty of double the amount under which the

Penalty on bond.

estate and effects of the deceased shall be sworn, unless the Court or District Registrar, as the case may be, shall in any case think fit to direct the same to be reduced, in which case it shall be lawfully for the Court or District Registrar so to do; and the Court or District Registrar may also direct that more bonds than one shall be given, so as to limit the liability of any surety to such amount as the Court or District Registrar shall think reasonable.

Compare, S. 78 of the Probate and Administration Act.

LXXXIII. The Court may, on application made on motion or petition in a summary way, and on being satisfied that the condition of any such bond has been broken, order one of the Registrars of the Court to assign the same to some person, to be named in such order, and such person, his executors or administrators, shall thereupon be entitled to sue on the said bond, in his own name, both at law and in equity, as if the same had been originally given to him instead of to the Judge of the Court, and shall be entitled to recover thereon as trustee for all persons interested the full amount recoverable in respect of any breach of the condition of the said bond.

Compare, S. 79 of the Probate and Administration Act.

XCI. One or more safe and convenient depository or depositories shall be provided, under the control under directions of the Court of Probate, for all such wills of living persons shall be deposited therein for safe custody; and all persons may deposit their wills in such depository upon payment of such fees and under such regulations as the Judge shall from time to time by any order direct.

As to depositories
for safe custody of
the wills of living
persons.

Compare, (i) S. 81 of the Probate and Administration Act,

and (ii) Ss. 42 to 46 of the Indian Registration Act.

COURT OF PROBATE ACT, 1858.

(21 and 22 VICT., C. 95.)

XVI. Whenever an executor appointed in a will survives the testator, but dies without having taken probate, and whenever an executor named in a will is cited to take probate, and does not appear to such citation, the right of such person in respect of the executorship shall wholly cease; and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor.

An executor not
acting or not appearing
to a citation to
be treated as if he
had renounced.

Compare, S. 17 of the Probate and Administration Act

XXIII. It shall be lawful for a Registrar of the principal registry of the Court of Probate, and whether any suit or other proceeding shall or shall not be pending in the said Court, to issue a subpoena requiring any person to produce and bring into the principal or any district registry, or otherwise, as in the said subpoena may be directed, any paper or writing being or purporting to be testamentary, which may be shown to be in the possession, within the power, or under the control of such person; and such person, upon being duly served with the said subpoena, shall be bound to produce and bring in such paper or writing, and shall be subject to the like process of contempt in case of default as if he had been a party to a suit in the said Court, and had been ordered by the Judge of the Court of Probate to produce and bring in such paper or writing.

Registrar may
issue subpoenas to
produce papers, etc.

Compare, S. 54 of the Probate and Administration Act.

THE PROBATE AND ADMINISTRATION ACT, 1881.

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